

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

UGOCHUKWO GOODLUCK NWAUZOR,
et al.,

Plaintiffs,

v.

THE GEO GROUP, INC.,

Defendant.

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

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)
)
)
) 3:17-cv-05769-RJB
) 3:17-cv-05806-RJB
)
) Tacoma, Washington

) June 14, 2021

) Jury Trial

) 9:00 a.m.

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE

Proceedings stenographically reported and transcribed
With computer-aided technology

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MORNING SESSION

JUNE 14, 2021

(The following occurred outside the presence of the jury.)

THE COURT: I just wanted to ask you all about time here. What are we looking at in terms of time to complete the defendant's case and any rebuttal? I have to get cracking on jury instructions.

MS. MELL: Your Honor, we were actually going to touch base with you this morning on that. I had an opportunity to talk with Mr. Whitehead, and I think he spoke with the other plaintiffs' counsel. We are anticipating this morning may go fairly quickly. We have a few little issues we need to bring up with regard to recalling Mr. Grice to get in the current ESA policy. Otherwise, this morning we are looking at completing Mr. Ragsdale in not too much time, recalling Mr. Grice just for a second to get in the ESA, then we have two other agency people we may or may not call, and then finally Mr. Scott will be on very briefly for probably less than a half an hour. We anticipate probably completing our case, and we understand the opposite side has no rebuttal witnesses unless something comes up this morning they want to do, and then both sides have to do the 50 motions and then we need instructions, and then we were going to recommend that we be able to close in the morning.

THE COURT: You anticipate no rebuttal?

1 MS. MELL: That is what we heard from them yesterday.

2 MR. WHITEHEAD: Your Honor, at this time I am not
3 anticipating a rebuttal case. We need to see how this
4 morning plays out. Based on what we have heard so far, I
5 don't anticipate one, Your Honor. I will let Ms. Chien speak
6 for the State.

7 MS. CHIEN: That's the same with the State,
8 Your Honor.

9 THE COURT: Well, if I knew it was going to go that
10 fast, I would have worked yesterday on jury instructions.
11 Let's see where we get, and I will have to take some time to
12 work on instructions. Okay. I think the jury is all here.
13 Is Mr. Ragsdale here?

14 MS. CHIEN: I think it might be prudent to discuss
15 Mr. Grice. We don't believe he should be recalled. He was
16 excused by the Court when he testified on Friday. He is
17 honestly on parental leave, and we don't have an easy way of
18 contacting him.

19 MS. MELL: It is highly prejudicial for the State to
20 take the position we can't recall Mr. Grice or,
21 alternatively, get a stipulation or agreement or available
22 witness to authenticate the current version of the ESA that
23 was admitted into evidence.

24 The State is deliberately prejudicing us on this question
25 because the ESA was modified, to which they did not disclose

1 to us which I learned when Mr. Grice was testifying to
2 include the cross references to detention centers so that it
3 broadly mirrors the actual exemption for private
4 corporations.

5 The ESA that is in front of the jury right now is limited
6 to correctional facilities. The testimony from Mr. Grice is
7 they amended it to be more consistent with the statutory
8 exception to (k) for private corporations, and they have
9 incorporated even detention centers, that whole litany of
10 different kinds of detention or the exception to (k). We
11 just need the current one into the record.

12 MS. CHIEN: From the State's perspective, we don't
13 believe the ESA1 is admissible. It does not have the force
14 of law. In addition to the idea that this prejudice -- the
15 State is prejudicing GEO, that's not true. GEO had an
16 opportunity to ask Mr. Grice about all of these, about any
17 current ESAs on Friday. They didn't, and he was excused. We
18 don't believe his parental leave should be disturbed again to
19 come back and testify because GEO wasn't prepared for his
20 testimony.

21 MS. MELL: That's wholly inaccurate. I did ask him
22 on the stand. He did say it had changed, which is the first
23 notice we received from the State even though the State has
24 an obligation -- continuing obligation to update us on that
25 kind of discovery. It did not. I asked him about it. He

1 said it didn't change. I didn't have the ability in this
2 venue to get an updated exhibit out while he was on the
3 stand.

4 MS. CHIEN: It is a public policy.

5 THE COURT: Where is your proposed exhibit?

6 MS. MELL: I will upload it to you right now. It is
7 in the Box. A-321. The comparator exhibit is 308. The
8 language is highly critical to GEO's arguments in this case.

9 It is an administrative policy that is published on the
10 L&I's website and to which Mr. Grice testified. We could
11 just get it admitted as the policy that he testified to.

12 THE COURT: I am trying to see it.

13 THE CLERK: A-321.

14 MS. CHIEN: Could you email it to us because I don't
15 think we have gotten a copy of it.

16 MS. MELL: It is right on Labor & Industries' website
17 under "administrative policy for the Minimum Wage Act
18 applicability." I can read into the record the language
19 change in the sentence at issue, if that is helpful.

20 THE COURT: It would not be helpful. I need to read
21 it. I would like to get it here. Rachel went to the printer
22 to see if it is on there.

23 MS. MELL: Subsection (k), Page 6 of 9 in the updated
24 policy. The sentence has been expanded to include residents,
25 inmates or patients of state, county, municipal correctional,

1 detention, treatment or rehabilitative institutions. Whereas
2 the exhibit --

3 THE COURT: Just a minute. Just a minute. What is
4 the exhibit that is admitted, the number?

5 MS. MELL: A-308. The language on A-308 is on Page 5
6 of 6, sub (k), last sentence.

7 THE COURT: Why is that not just admissible by
8 stipulation?

9 MS. CHIEN: We don't actually -- we don't -- we
10 didn't stipulate to the admission of A-308. We don't believe
11 administrative policies should be provided to the jury in the
12 first place, so that's why we can't stipulate to the
13 admissibility of A-321 either.

14 THE COURT: Is there any question about the -- about
15 this being the accurate policy that was revised in 2020?

16 MS. CHIEN: I don't believe there is any question of
17 accuracy. However, we have a concern about introducing an
18 exhibit for which there is no explanation that this exhibit
19 is actually the same as A-308. It doesn't actually change
20 anything in terms of its applicability to private facilities
21 in the sense the Minimum Wage Act still applies to private
22 facilities regardless under A-308 and A-321.

23 MS. MELL: Your Honor, Mr. Grice clarified the
24 enforcement's position of the agency did not change with any
25 of the changes. He testified to that.

1 MS. CHIEN: Which then would bring us to an
2 additional objection that this isn't necessary.

3 MS. MELL: It is necessary because the language is
4 distinctly different, and they were going to argue it was
5 only applicable to correctional facilities which are
6 distinct. The importance of the changes is it mirrors
7 exactly the subsection (k) exemption and includes detention
8 facilities.

9 THE COURT: Detention facilities are mentioned in
10 A-308 as well.

11 MS. MELL: It is not -- as it relates to private
12 facilities.

13 THE COURT: The answer to this question is that you
14 can call Mr. Grice if there is no stipulation as to the
15 authenticity of the document. It should be admitted to
16 clarify the record if the policy was testified to and it has
17 been changed. You can either do it by interrupting the
18 witness's vacation or whatever he is doing or you can do it
19 by stipulation, which would simplify matters, but it is not
20 required.

21 All right. Is Mr. Ragsdale here and ready to go?

22 THE WITNESS: Good morning. Yes, I am here.

23 THE COURT: Good morning, Mr. Ragsdale. All right,
24 bring the jury in.

25 (The following occurred in the presence of the jury.)

1 THE COURT: That looks like the happy nine. Good
2 morning, folks. We are ready to continue with Mr. Ragsdale's
3 testimony this morning. I guess you are all awake and ready
4 to go.

5 You may inquire, Counsel.

6 DIRECT EXAMINATION (Resumed)

7 BY MS. SCHEFFEY:

8 Q Mr. Ragsdale, when we left off on Friday, we were talking
9 about hygiene items. Do you remember that?

10 A Good morning. Yes, I do.

11 Q Is there anything detainees need to pay for while at a GEO
12 facility?

13 A There is a specific detention standard that relates to
14 hygiene, and ICE requires its contractors to provide all the
15 items that a person would need to take care of themselves.
16 It is expressly called out in the standard. No, all of that
17 is free.

18 Q Who sets up the phone services at GEO facilities?

19 A ICE has its own contractor separate from GEO that provides
20 the telephone service.

21 Q You also testified on Friday that you were a compliance
22 officer for the GEO Group. Do you recall that testimony?

23 A Yes.

24 Q I believe you explained that your team ensures that GEO
25 meets its contractual requirements as well as any standards

1 appropriated; is that correct?

2 A Yes, we audit. We develop tool questions, as I mentioned
3 on Friday. We pull samples at the facilities to see if we
4 are compliant with detention standards in the contract, yes.

5 Q I would like to talk about how that works specifically at
6 the Northwest ICE Processing Center. If my tech team could
7 pull up Exhibit 129, which we will be going to Page 5 of the
8 document. If we could call out the CLIN 0003.

9 Mr. Ragsdale, how does your team assess compliance with
10 detainee pay under the contract?

11 A We develop tool questions or audit questions based on each
12 standard. To the extent, as we looked at in Standard 5.8,
13 there are expected outcomes. We would develop questions and
14 then pull samples of the files at the Northwest ICE
15 Processing Center to determine that the detainee work program
16 was administered according to the standard. We would
17 physically pull a number of people's individual files to
18 check and make sure they -- if they wanted to participate in
19 the voluntary work program and they did, in fact, participate
20 in the voluntary work program, they were paid at least a
21 dollar a day.

22 Q When you are looking at a file, what amount are you
23 looking at for a detainee to -- that a detainee is paid to
24 ensure compliance?

25 A A least a dollar a day.

1 Q Does your audit consider whether detainees are paid
2 minimum wage?

3 A No, that is outside the scope of what the standard
4 requires.

5 Q Let's turn to pay GEO-State 036868, which is Page 44 of
6 the document. I would like to call out letter q, small q.

7 When you are performing your compliance duties, do you
8 read this section to include application of the Washington
9 Minimum Wage Act to detainees?

10 A I don't see a section. I don't see anything.

11 Q Do you see Section (q) on your screen, applicable --

12 A I just see the folks.

13 Q Do you have the contract in front of you?

14 A Yes, I think I do.

15 Q We are on Page 44 of that document, if it is easier.

16 A 44 of 203 pages?

17 Q Yes, the Bates stamp at the bottom is GEO-State 036868.

18 A I think I have a copy of the contract. I don't think that
19 is what I am looking at here.

20 Q Do you have on your screen -- is there someone that --

21 A The tech gentleman just came in.

22 Q For the tech person, we should have a split screen with
23 me, the jury.

24 A Okay. Now I see it.

25 Q Do you see Section (q) of the contract?

1 A Yes.

2 Q When you are performing your compliance duties, do you
3 read this section to include applying the Washington Minimum
4 Wage Act to detainees?

5 MR. POLOZOLA: Objection, leading, Your Honor.

6 THE COURT: Sustained.

7 BY MS. SCHEFFEY:

8 Q When you are assessing compliance and you look at this
9 section, what do you check for?

10 A This is a section that obviously is a layered approach.
11 There are certain laws and requirements that the federal
12 government requires, there are certain things obviously the
13 states require, and certain things like municipalities and
14 other entities can require.

15 We would look at this, and particularly as it relates to
16 the detainee work program, the detainee work program is not
17 employment, again, as we talked about on Friday. It is a
18 volunteer program that is, again, to allow folks to have a
19 normal schedule, earn a nominal amount of money, and give
20 them something to do. Anything like in terms of an employee
21 or employer relationship, particularly as relates to folks
22 that are not citizens, as we talked a little bit about on
23 Friday, is the section of the Immigration and Nationality Act
24 that relates to employing people that are not citizens is
25 ICE's responsibility along with another department, another

1 agency in DHS. There is not a situation where we would look
2 on behalf of ICE to determine that somebody was paying
3 minimum wage as an employee. It doesn't apply in this case.

4 MR. POLOZOLA: Your Honor, I am going to object that
5 the witness's answer is non-responsive. He is testifying to
6 what the law should be in this case.

7 THE COURT: The answer may stand.

8 BY MS. SCHEFFEY:

9 Q How do you comply with this section and also the dollar
10 per day payment?

11 A We pull files that the facility maintains for the folks
12 that participate in the voluntary work program. There is
13 around 15 or 20 questions. We look at each element. I think
14 as I mentioned on Friday, folks that have limited English
15 proficiency need to have an opportunity. Folks -- it has to
16 be done and administered in a fair way. Folks need to have a
17 certain amount of training to make sure if there is some
18 amount of technical use of equipment.

19 We would go through each of those elements to make sure
20 the program is being administered according to the standards
21 ICE requires and the outcomes.

22 Q I would like to go to GEO-State 036906, Page 82 of the
23 document. If we could call out the "manage a detainee work
24 program" section. Can you see that on the screen?

25 A Yes.

1 Q How does your compliance team measure whether GEO has
2 complied with the portion of this contract that prohibits it
3 from using detainees to perform the duties of an employee of
4 the contractor?

5 A As we talked about Friday, the contract has a staffing
6 plan. In other words, GEO proposes a number of employees
7 that ICE has to clear, give a background check and then bring
8 on. It is five positions. Everybody has a function.
9 Ultimately, everybody who works as a GEO employee is there to
10 make sure that we have a safe, secure, humane environment
11 that is appropriate under ICE's standards for the purpose of
12 the contract.

13 Detainees are not doing things that GEO employees are
14 doing. In other words, the GEO employees are the people that
15 are responsible for the department, responsible for making
16 decisions. Again, in other words, the voluntary work program
17 standard explicitly says what the voluntary work program can
18 do. It can be in laundry. It can be in janitorial. It can
19 be in the kitchen. GEO can't take detainees and have them do
20 things that are outside the scope of the voluntary work
21 program.

22 Q Have you ever seen a staffing plan that includes
23 detainees?

24 A No.

25 Q If we could clear Exhibit 129 off the screen. I would

1 I like to look at Exhibit 127, which is the Performance-Based
2 National Standards. I would like to go to GEO-Nwauzor
3 185199, which is Page 407 at the bottom of the PDF. If we
4 can call out the "compensation" section.

5 Can you see that on your screen?

6 A I can.

7 Q Could GEO pay minimum wage and still comply with this
8 requirement?

9 A No, we would not pay minimum wage because it would so
10 materially change what ICE's requiring us to do that we
11 couldn't do that on our own. It is an ICE decision. ICE
12 requires us to pay at least a dollar, and that's what we
13 audit to.

14 Q How would it change what ICE is requiring you to do?

15 A We talked a little bit about this on Friday, it would
16 materially change the amount of money that employees would
17 have in their -- sort of in their detainee banking system.
18 In terms of even just managing, in terms of having folks
19 wanting to participate, might be oversubscribed. It just
20 would fundamentally change the purpose of the detainee work
21 program.

22 Again, it is something the agency gets to decide. GEO is
23 not in a policy making decision. We don't get to interpret
24 the standards. We don't get to agree with some, disagree
25 with others, or materially change some. We are supposed to

1 follow the black letter standards. That would be a material
2 change.

3 Q I think you said it would change the purpose. What is
4 your understanding of what the purpose of the voluntary work
5 program is?

6 A Again, the voluntary work program, under the "activities"
7 section of the standards is, I think, again, to give folks as
8 much a sense of sort of normalcy, normal schedule, give them
9 something meaningful to do. Again, they can earn a nominal
10 amount of money. It is not meant -- it is meant to, again,
11 sort of contribute to the good order of the facility, but it
12 is not meant to be anything other than an activity.

13 Q If the voluntary work program were to be deemed employment
14 which requires minimum wages, would you recommend to GEO and
15 ICE the program continue?

16 A I am not in a policy-making decision. I think that is
17 such a material change it would have to be something that the
18 agency, the Department of Homeland Security, and probably
19 Congress would have to weigh in on.

20 Q Do you think the voluntary work program in your opinion
21 benefits detainees?

22 A I do. Again, as I think I mentioned Friday, and I
23 believe, again, having a normal schedule, in other words, I
24 have been in detention facilities where you see folks who can
25 literally stay in their bed all day long. They can play

1 video games. They can play soccer. They can do those
2 things. There are some folks, particularly that are indigent
3 and obviously would welcome the dollar, certainly in terms of
4 you see folks even in places in the Western Hemisphere a
5 dollar of U.S. is a considerable amount of money.

6 It was part of our detention reform, we expanded the work
7 program during the Obama administration. It is helpful, and
8 it is entirely voluntary. If they want to do it, they
9 certainly can do it. If folks don't want to do it, they
10 absolutely don't have to.

11 MS. SCHEFFEY: Thank you. I have no further
12 questions.

13 MR. POLOZOLA: May I proceed, Your Honor?

14 THE COURT: You may.

15 CROSS-EXAMINATION

16 BY MR. POLOZOLA:

17 Q Good morning, Mr. Ragsdale.

18 A Good morning.

19 Q Nice to see you again.

20 In your role at GEO, you are not in charge of
21 negotiating contracts for GEO, are you?

22 A I am not.

23 Q You are not in charge of interpreting contracts for GEO,
24 are you?

25 A In part, you know, my -- I am consulted on what the

1 contract says. In other words --

2 Q Mr. Ragsdale, it was a yes-or-no question.

3 A I will say no then.

4 Q Thank you. Now, before joining GEO in 2017, you worked
5 for ICE, I believe you said, correct?

6 A I did.

7 Q You were the number two person at ICE, I believe?

8 A From 2012 to 2017, yes.

9 Q Which made you a pretty important person at ICE?

10 A I will say -- I am not sure what to say to that, but
11 probably.

12 Q Now you work for GEO, correct?

13 A I do.

14 Q You report directly to GEO's CEO; isn't that right?

15 A I do.

16 Q In your current role, you make about \$300,000 a year; is
17 that correct?

18 MS. SCHEFFEY: Objection, relevance.

19 THE WITNESS: I do.

20 MS. SCHEFFEY: Foundation, facts not in evidence.

21 THE COURT: He may answer.

22 THE WITNESS: I do.

23 BY MR. POLOZOLA:

24 Q Now, as part of your compensation working for GEO, you
25 also receive shares from GEO, GEO stock, correct?

1 A I do.

2 Q So you are a GEO shareholder as you sit here today,
3 correct?

4 A Yes, I am.

5 Q Does that mean you receive dividends from GEO each year?

6 A Yes, I do.

7 Q Now, last week counsel told you at one point to put your
8 GEO hat on. Do you remember that statement?

9 A I think so, yes.

10 Q Okay. Well, that's actually the only hat you have right
11 now, isn't it, because you don't work for ICE anymore,
12 correct?

13 MS. SCHEFFEY: Objection, argumentative.

14 THE COURT: Overruled.

15 THE WITNESS: That is correct.

16 BY MR. POLOZOLA:

17 Q You weren't here as an ICE employee or representative. Do
18 I have that right?

19 A Yes.

20 Q You are not testifying for ICE in this case, are you?

21 A No.

22 Q And you are not here testifying under ICE's official
23 authorization, are you?

24 A No.

25 Q Because you work for GEO; is that right?

1 A Correct.

2 Q GEO is not the federal government; isn't that right?

3 A GEO is not the federal government, no.

4 Q Now, do you remember when I took your deposition in this
5 case, it was back in June 2020, by Zoom?

6 A I do.

7 Q And do you remember that I asked you questions about
8 certain things about what ICE does?

9 A You know, I know we covered a lot in the deposition. I
10 can't say I have it memorized. If you point me to something,
11 I am sure you can refresh my recollection.

12 Q Well, I actually have a more general question. Do you
13 recall when I asked you about certain things ICE does, that
14 GEO's counsel actually objected and said you weren't prepared
15 to testify as to what ICE does and that you actually would be
16 prohibited from doing so?

17 MS. SCHEFFEY: Objection, Your Honor, this is reading
18 in counsel's objections from a deposition, which is not
19 proper at trial.

20 THE COURT: He may answer the question.

21 THE WITNESS: Yeah, I don't remember precisely, no.
22 If you point me to something, I'll be happy to look at it,
23 but no, I don't remember.

24 BY MR. POLOZOLA:

25 Q In any event, you understand because you don't work for

1 ICE anymore, you can't legally speak for ICE; isn't that
2 correct?

3 A I do understand that, yes.

4 Q Okay. So a moment ago I believe you said "when we did
5 something at ICE," I understood you to be expressing a
6 position about what ICE may have done. You can't speak for
7 ICE in this case, correct?

8 MS. SCHEFFEY: Objection, asked and answered.

9 THE WITNESS: After 21 years, it is hard to do that,
10 but yes, I am not speaking for ICE.

11 BY MR. POLOZOLA:

12 Q Now you testified to a few things on Friday and then
13 briefly this morning that I think we need to address. First,
14 I believe you told the jury the compensation rate for
15 detainee workers of a dollar a day is, quote, set by the
16 agency or ICE, do you remember testimony to that effect?

17 A I do.

18 Q That's not accurate, is it?

19 A It is my understanding, yes.

20 Q You understand the contract only limits what ICE will
21 reimburse GEO, correct?

22 A No. In other words, as I think I explained Friday, the
23 budget formulation process at ICE, right, when I was there,
24 and even in the President's FY '22 budget, contemplates the
25 agency funding detainee pay.

1 Q Mr. Ragsdale, you just said --

2 MS. SCHEFFEY: Object, interrupting the witness.

3 THE COURT: He is beyond the question.

4 What is the next question?

5 BY MR. POLOZOLA:

6 Q The question, Mr. Ragsdale, is: You understand ICE agreed
7 to reimburse GEO one dollar a day for each detainee work
8 shift; is that correct?

9 A There is a contract line item number that says a dollar
10 for the detainee work program. It is in the contract, yes.

11 Q That says ICE will reimburse GEO one dollar per day,
12 correct?

13 A Yes.

14 Q There is nothing in that contract that says GEO can only
15 pay one dollar to detainee workers; isn't that correct?

16 A It does not read only one dollar, no.

17 Q There is nothing in the PBNDS, the standards, that limits
18 GEO to paying only one dollar per day to detainee workers; is
19 that correct?

20 A As I said earlier, the standards we take as black letter.
21 We don't add our own sort of plusses and minuses. We follow
22 the standards very precisely. It is a dollar, which is why
23 it has been a dollar, and it is a dollar.

24 Q Well, Mr. Ragsdale, it is not a dollar; isn't that right?
25 The standard says "at least one dollar," correct?

1 MS. SCHEFFEY: Objection. Asked and answered.

2 THE COURT: Overruled.

3 THE WITNESS: Again, I think as I told you, when we
4 developed our audit tools and the way we look at the
5 standard, we look to make sure people are paid at least a
6 dollar a day.

7 BY MR. POLOZOLA:

8 Q You agree with me the ICE standard does not prevent GEO
9 from paying detainee workers more than a dollar a day,
10 correct?

11 A No.

12 Q The ICE standard does not prevent or limit GEO from paying
13 detainee workers the minimum wage for work performed?

14 A As I already said, I think that is such a material change,
15 I don't think we would be allowed to do that, in my opinion.

16 Q My question is: Does the ICE standard, the PBNDS 5.8,
17 limit GEO from paying detainee workers the minimum wage for
18 work they perform?

19 A Again, does it say that in express terms? No, it does not
20 contemplate minimum wage anywhere in the standard, no.

21 Q You will agree with me that, for example, 13.69 per hour
22 is more than one dollar per day, correct?

23 A Yes.

24 Q That would be at least one dollar per day; is that right?

25 A 13.69 per hour is, yes, more than a dollar a day.

1 Q Assuming you work for just a few minutes?

2 A Indeed.

3 Q Now, we have been talking about the PBNDS. Those are
4 ICE's standards, correct?

5 A Yes.

6 Q So those are standards that GEO agreed to follow when it
7 chose to do business with the federal government, correct?

8 A Yes, they are in the contract, yes.

9 Q That is part of the deal when GEO decides it wants to do
10 business with ICE, it agrees to follow the standards,
11 correct?

12 A Yes.

13 Q Are you aware, Mr. Ragsdale, that GEO has already agreed
14 in this case that it had the option to pay more than a day to
15 detainee workers for work they do at the Northwest Detention
16 Center?

17 A I'm sorry. I don't think I understood your question. Can
18 you repeat that. I think you said "a day," and you meant "a
19 dollar a day."

20 Q Sure. Are you aware that GEO has already agreed that it
21 has the option to pay workers more than a dollar a day for
22 work they do at the Northwest Detention Center?

23 A I don't know the nature of that agreement. I am not
24 personally aware of it, no.

25 Q Well, do you agree that GEO has the option to pay detainee

1 workers more than a dollar per day for work they do at the
2 Northwest Detention Center?

3 A I do know it is possible for GEO to pay more than a
4 dollar. I don't know that it has happened at the Northwest
5 ICE Processing Center. I know it is possible, yes.

6 Q You talked about the contract a moment ago with counsel.
7 So you understand that GEO's contract -- or in GEO's
8 contract, ICE told GEO to follow state and local labor laws,
9 correct?

10 A I believe it is in the contract. We just looked at that,
11 yes.

12 Q Then I believe you also looked at the work program portion
13 of the contract. Do you recall that a moment ago?

14 A Yes.

15 Q So you agree that in that portion of the contract, ICE
16 told GEO specifically with respect to the work program that
17 the work program must comply with all applicable laws and
18 regulations, correct?

19 A That is what the contract says, yes.

20 Q Another thing you said on Friday, I believe, I believe you
21 told the jury that everybody is paid a dollar a day in the
22 program because that's the set rate. My question is: That's
23 not the set rate, correct?

24 A I think it is the set rate. I think it is a dollar a day.
25 That's my opinion.

1 Q Are you aware GEO has paid detainees at the Northwest
2 Detention Center more than a dollar per day in the past for
3 work they have done in the work program?

4 A Again, as I said, I didn't know precisely at the Northwest
5 ICE Processing Center. I do know there have been occasions,
6 I think, again, for lack of participation or for whatever
7 reason, to incentivize participation, they pay more than a
8 dollar per day, yes, I am aware.

9 Q If the jury heard from other folks that worked at the
10 Northwest Detention Center that workers have been paid, for
11 example, five dollars for working in the kitchen, you would
12 have no basis to disagree with that?

13 A I have no knowledge of it, no personal knowledge of it,
14 no.

15 Q And are you aware that in other GEO facilities where
16 immigration detainees work, GEO sometimes pays more than a
17 dollar to those workers, correct?

18 A I am aware, yes.

19 Q Are those facilities -- they include the Montgomery
20 facility in Texas?

21 MS. SCHEFFEY: Objection, assumes facts not in
22 evidence.

23 THE WITNESS: Montgomery is the one I am aware of.

24 THE COURT: The objection is overruled. When there
25 is an objection, Mr. Ragsdale, wait for a ruling before you

1 respond.

2 THE WITNESS: Yes, sir.

3 BY MR. POLOZOLA:

4 Q At that facility, GEO pays more than a dollar a day
5 because of supply and demand?

6 A I am not sure supply and demand. The voluntary work
7 program and the activities that are part of the program are
8 supposed to contribute to the running of the facility. There
9 is a staffing plan and there are some assumptions about, to
10 use your term, in terms of negotiation about the voluntary
11 work program is part of the way the facility runs and, again,
12 some level of participation.

13 To use your term in terms of the negotiations, to make the
14 facility work the way it is supposed to work, that is why
15 they have, on occasion, paid more than a dollar a day, as I
16 understand it.

17 Q If I am understanding what you are saying, sometimes a
18 dollar a day isn't enough to make people want to work so you
19 have to pay a little more, correct?

20 MS. SCHEFFEY: Objection, argumentative.

21 THE COURT: Overruled.

22 THE WITNESS: I can't speculate as to why people do
23 it. In other words, I know that it has happened.

24 BY MR. POLOZOLA:

25 Q It is up to GEO to pay more than a dollar in those

1 circumstances when it decides it needs to, correct?

2 A GEO is responsible for the day-to-day function. We have
3 to deliver meals to obviously everybody in the facility.
4 Again, the assumptions and the staffing plan assumes there is
5 detainee participation in the work program working in the
6 kitchen. Yes, it would be GEO's responsibility under the
7 performance-based contract to make sure that happened, let's
8 just say, laundry, et cetera. Yes, it is GEO's decision. Is
9 it a long-term, sustainable part of the negotiations? No.

10 Q You didn't negotiate the contract for the Northwest
11 Detention Center for GEO, did you?

12 A No, but I think we talked about on Friday all of these --

13 Q Mr. Ragsdale, it was a yes-or-no question.

14 A Did I do it? No.

15 Q You didn't negotiate it on ICE's behalf either, did you?

16 A No.

17 Q You said you have been to the Northwest Detention Center
18 in the past, correct?

19 A Yes.

20 Q How many times?

21 A I think probably three times, but again, it has been a
22 long time. 21 years is a long time. I think at least three
23 times.

24 Q When did you visit the Northwest Detention Center?

25 A I have been there once since joining GEO. Once that we

1 talked about in 2014, and I believe one time before that.

2 Q You have never been there with the goal of determining
3 whether GEO is complying with its contractual obligations,
4 have you, for auditing purposes?

5 A My team has. I have employees that do that. Not myself.

6 Q Not you, right?

7 Now, I want to circle back to what you were talking
8 about a moment ago, the nature of the work. You agree that
9 detainees perform legitimate work at the Northwest Detention
10 Center?

11 A "Work" in the comments, the way we say it, yes, they
12 perform work.

13 Q It is not made-up work?

14 A By standard, it is not supposed to be made-up work.

15 Q Not mere personal chores, is it?

16 A I believe the standard does -- for personal housekeeping,
17 folks' immediate living area, obviously, in other words, a
18 maid doesn't come in to change their sheets. Their personal
19 area, they are supposed to clean up. No, the work is
20 supposed to be meaningful.

21 Q The work for which they are compensated through the work
22 program, those aren't chores, are they?

23 MS. SCHEFFEY: Objection.

24 THE WITNESS: No. No.

25 THE COURT: He may answer.

1 THE WITNESS: No.

2 BY MR. POLOZOLA:

3 Q I do want to understand, if the detainee workers didn't do
4 that work that they are compensated for now, GEO would still
5 have to do that work, correct?

6 A The functions would have to get done, yes. Precisely how
7 would be probably something that GEO would go back to ICE to
8 discuss and renegotiate.

9 Q We don't know that because it hasn't happened, correct?

10 A It has not happened to my knowledge, no.

11 Q In any event, GEO still has to serve thousands of meals
12 that detainees have to eat, correct?

13 A Absolutely.

14 Q Even if there are no detainee workers to help prepare and
15 serve those meals?

16 A Again, performance-based contract, the requirements don't
17 change.

18 Q Right, so up to GEO how the meals get served, but they got
19 to get served; isn't that right?

20 A Yes.

21 Q GEO still has to do all the laundry for everyone in the
22 facility?

23 A Yes.

24 Q Even if the detainee workers don't show up to work,
25 correct?

1 A Yes.

2 Q Doesn't matter how GEO chooses to do that, the laundry
3 just has to get done, correct?

4 A Correct.

5 Q GEO still has to keep the entire facility clean even if
6 the detainee workers don't work, correct?

7 A Correct.

8 Q Doesn't matter how GEO does that, it has to get done?

9 A Correct.

10 Q Okay. So on audits, you spoke a moment ago about your
11 team, the auditing team. I believe you said last week that
12 your team makes sure GEO meets the contract requirements with
13 their clients and whatever standards are incorporated in the
14 contract; is that right?

15 A Yes.

16 Q As we just discussed, you know the Northwest Detention
17 Center requires GEO to follow all state -- federal, state and
18 local labor laws, correct?

19 A I think you and I are probably going to disagree about
20 which laws apply as I understand them. The answer is yes, to
21 the extent they apply, we are supposed to audit them, yes.

22 Q So on that, I want to be clear that when you are going
23 around auditing facilities like the Northwest Detention
24 Center, you aren't checking to see whether workers make more
25 than a dollar per day, correct?

1 A We are checking to make sure they get paid at least a
2 dollar a day.

3 Q So you are not looking to see whether GEO is complying
4 with Washington's Minimum Wage Act, are you?

5 A As relates to the detainee work program, no.

6 Q Your team is not checking to see whether GEO pays into
7 Washington's unemployment compensation fund, correct?

8 A I don't think so, no.

9 Q You are not asking whether GEO follows the rules about
10 paying into Washington's paid family and medical leave
11 programs like other businesses, are you?

12 A No.

13 Q I think you mentioned that ICE conducts audits of the
14 Northwest Detention Center. Did I hear you speak about that?

15 A Yes, they do.

16 Q You don't actually know what ICE audits with respect to
17 the work program, do you?

18 A I don't know precisely what they audit. They would audit
19 based on the outcomes and the standards in 5.8. That's the
20 way the tools are built.

21 Q Is it your understanding ICE is not auditing to see
22 whether GEO is paying workers the minimum wage at the
23 Northwest Detention Center?

24 A You know, again, I don't want to speculate. I don't think
25 so.

1 Q ICE isn't auditing to see whether GEO is complying with
2 Washington law; is that right?

3 A I don't know. That, I don't know.

4 Q Because ICE doesn't enforce Washington law, does it?

5 A Not that I am aware of.

6 Q Mr. Ragsdale, do you know who the Department of Homeland
7 Security Office of the Inspector General is?

8 A Yes, I do.

9 Q The inspector general provides independent oversight and
10 accountability for ICE?

11 A Yeah, I mean, I wouldn't quite phrase it that way. They
12 have -- they are a statutory IG Act office. They are
13 supposed to help the secretary manage the department.

14 Q They perform inspections at the Northwest Detention
15 Center?

16 A The IG can visit any facility they wish. I don't know
17 whether they have been to the Northwest ICE Processing
18 Center.

19 Q So in your job, are you responsible for working with
20 ICE -- with the inspector general if they want to inspect the
21 Northwest Detention Center?

22 A Certainly, we would collaborate. We certainly collaborate
23 with both -- we haven't worked, since the time I have been
24 here, so closely with the inspector general at DHS. We have
25 done more with DOJ. We certainly are responsive to any of

1 their requests, yes.

2 Q Did I understand your testimony a moment ago to be that
3 you are not sure if the inspector general has ever done an
4 inspection at the Northwest Detention Center?

5 A Yeah, I don't know off the top of my head.

6 Q If the inspector general had done an inspection at the
7 Northwest Detention Center and determined that ICE's
8 standards were violated, is that something you would know
9 about in your position?

10 MS. SCHEFFEY: Objection. Assumes facts not in
11 evidence.

12 THE WITNESS: I'll be honest with you, I don't
13 memorize every report at every facility. There are a lot of
14 them. If I checked and there was a report, yes -- we would
15 have --

16 THE COURT: The objection is overruled. If you would
17 wait when there is an objection, Mr. Ragsdale, for a ruling.

18 THE WITNESS: Yes. Sorry.

19 BY MR. POLOZOLA:

20 Q Are you aware of any instances in which the Office of the
21 Inspector General has determined that GEO's facilities where
22 ICE detainees are held has violated the PBNDS?

23 A Yes, there are several reports, I believe, to facilities
24 in California, a facility in Louisiana, so, yes, there have
25 been audits where the IG has found that we have not -- found

1 areas of non-compliance, yes.

2 Q Are you aware of any reports by the inspector general
3 critiquing the quality of ICE's auditing standards and
4 processes?

5 A I have read reports over the years where the IG has made
6 those comments, yes.

7 Q One moment, please.

8 Mr. Ragsdale, I think you testified at one point that
9 you had never visited a GEO detention facility where the
10 workers were paid the minimum wage; is that correct?

11 A To the best of my knowledge, yes.

12 Q Are you aware GEO is being sued over its detainee wage
13 payment practices in Colorado and California?

14 A I am --

15 MS. SCHEFFEY: Objection, outside the scope.

16 THE COURT: The objection is sustained.

17 BY MR. POLOZOLA:

18 Q Mr. Ragsdale, are you aware that GEO has asked ICE to step
19 in and defend this lawsuit?

20 A I am aware that the agency and GEO have discussed the
21 litigation. I know of no way that ICE can represent GEO. I
22 don't think it really works that way. I know the office --
23 litigation has been discussed between GEO and ICE.

24 Q To your knowledge, ICE hasn't stepped in and taken over,
25 has it?

1 A Right, but the Department of Justice litigates on behalf
2 of the United States, not ICE. It would be directed to DOJ,
3 not ICE.

4 Q Sure. Fair point. The Department of Justice has never
5 stepped in to defend these lawsuits, has it?

6 A Not to my knowledge, no.

7 Q That's because it is GEO's decision to pay only a dollar
8 per day to detainee workers, not the federal government's;
9 isn't that correct?

10 A I don't agree with that, no.

11 MR. POLOZOLA: No further questions, Your Honor.

12 MS. SCHEFFEY: Your Honor, I have two brief redirect
13 questions.

14 THE COURT: Just a minute. Mr. Whitehead.

15 MR. WHITEHEAD: Yes, Your Honor. Thank you.

16 CROSS-EXAMINATION

17 BY MR. WHITEHEAD:

18 Q Good morning, Mr. Ragsdale.

19 Earlier today, you answered there are laws that can
20 limit what you can say about your time with ICE. Do I have
21 that correct?

22 A Well, in other words, information that belongs to the
23 agency is the agency's. They give an ethic letter. I can
24 tell you about my experience, but I am not speaking on behalf
25 of ICE.

1 Q You are not testifying today on behalf of ICE, correct?

2 A Correct.

3 Q You would have to seek prior approval, in fact, to share
4 information obtained from your time during your employment at
5 ICE, correct?

6 A As relates to specific cases -- or, in other words, I
7 think I am perfectly able to talk about my experience. I
8 can't talk about information the agency owns, like in a
9 system of record.

10 Q That's so that former employees don't share sensitive
11 information, correct?

12 A Of course.

13 Q Also so that former employees don't misrepresent ICE's
14 position taken on any given subject?

15 MS. SCHEFFEY: Objection, calls for speculation.

16 THE COURT: He may answer.

17 THE WITNESS: Former employees can't bind the agency,
18 yes, there is appropriate limits.

19 BY MR. WHITEHEAD:

20 Q Earlier, you answered questions from Ms. Scheffey about
21 hygiene items provided by GEO to detainees at the Northwest
22 Detention Center. Do you remember that?

23 A I do.

24 Q You made a statement that the hygiene items are provided
25 free of charge. Do I have that right?

1 A Yes.

2 Q Those hygiene items, they are paid for by ICE, correct?

3 A Yes, by ICE, not by the detainees.

4 Q Just like the food provided at the Northwest Detention
5 Center, correct?

6 A Yes.

7 Q Clothing?

8 A All of the items that GEO provides are ultimately paid for
9 by the agency.

10 Q And GEO doesn't seek reimbursement from the detainees for
11 these items. Do I have that right?

12 A No, they do not seek reimbursement.

13 Q That's because they are already paid for by ICE?

14 A Correct. They are provided to the detainee for their
15 benefit.

16 Q At ICE's expense, correct?

17 A Correct, yes.

18 MR. WHITEHEAD: Thank you, sir.

19 MS. SCHEFFEY: I have a few brief redirect,
20 Your Honor.

21 THE COURT: Yes.

22 REDIRECT EXAMINATION

23 BY MS. SCHEFFEY:

24 Q I think you just testified that food, clothing and hygiene
25 items are ultimately paid for by ICE; is that correct?

1 A Yes.

2 Q Are those items contemplated at the outset of the contract
3 between GEO and ICE?

4 A Yes.

5 Q Is minimum wage for detainees contemplated at the outset
6 of the contract between GEO and ICE?

7 A Not to my knowledge, no.

8 Q You also testified about Montgomery where they pay two
9 dollars per day. Do you remember that?

10 A I don't know that it was precisely two dollars. I just
11 know anecdotally there have been occasions they paid more
12 than a dollar a day.

13 Q Are you aware of detainees at Montgomery ever getting
14 minimum wage?

15 A Not to my knowledge.

16 Q Is there any facility across the country where GEO pays
17 minimum wages for the voluntary work program?

18 A I have never heard of anybody making minimum wage, whether
19 GEO, ICE run, anybody. I have never heard of it.

20 Q Do the Performance-Based National Standards state that
21 detainees should be paid minimum wage anywhere in the
22 document?

23 A No, it does not.

24 Q Does the contract state that detainees should be paid
25 minimum wage anywhere in the document?

1 A No, it does not.

2 MS. SCHEFFEY: Thank you. No further questions.

3 MR. WHITEHEAD: Your Honor, briefly. See if I can do
4 it in three questions.

5 RECROSS-EXAMINATION

6 BY MR. WHITEHEAD:

7 Q Mr. Ragsdale, I understood you to say you are not aware of
8 GEO paying the minimum wage at any of its facilities
9 nationwide. Do I have that right?

10 A As relates to the detainee work program.

11 Q You understand that the voluntary work program is the
12 subject of litigation at other GEO facilities, correct?

13 A Yes, I am aware.

14 MR. WHITEHEAD: No further questions, Your Honor.

15 THE COURT: Mr. Ragsdale, in your earlier testimony
16 describing your work background, it sounded like some of your
17 jobs were legal jobs. Are you a lawyer?

18 THE WITNESS: I am, Your Honor. From '96 to 2008, I
19 was in the legal program at ICE and INS.

20 THE COURT: Yes. I take it you have retired from
21 federal government service?

22 THE WITNESS: Yes, in 2017.

23 THE COURT: Okay. All right. Thank you. You may be
24 excused.

25 THE WITNESS: Thank you very much.

1 MS. MELL: GEO would recall Mr. Grice.

2 MS. CHIEN: We stipulate to authenticity so we would
3 not have to call Mr. Grice back.

4 MS. MELL: Based on the stipulation of the State, we
5 offer Exhibit A-321 into evidence.

6 THE COURT: Any objection? A-321 may be admitted.

7 (Exhibit A-321 was admitted.)

8 MS. MELL: Your Honor, I ask to publish subsection
9 (k) of the updated policy.

10 MS. CHIEN: We don't believe that is appropriate.
11 There is no witness to testify to subsection (k).

12 THE COURT: The objection is sustained.

13 MS. MELL: The jury will have this in their evidence
14 to look at?

15 THE COURT: Certainly.

16 MS. MELL: Thank you, Your Honor.

17 With that being said, I believe we will be calling
18 Mr. Scott.

19 MS. CHIEN: Ms. Mell, does that mean you are not
20 calling Ms. Perrin?

21 MS. MELL: The next witness is Mr. Scott.

22 MS. SCHEFFEY: Mr. Campbell, Mr. Scott should be in
23 the waiting room now or momentarily.

24 THE CLERK: He just joined. He is on his way in
25 right now.

1 THE COURT: Here is Mr. Scott. Mr. Scott, you were
2 previously sworn. You are still under oath. Do you
3 understand? Okay. You were muted there for a minute. You
4 are clear now. You may inquire of Mr. Scott.

5 BRUCE SCOTT,
6 having been previously sworn under oath, testified as
7 follows:

8 DIRECT EXAMINATION

9 BY MS. SCHEFFEY:

10 Q Good morning, Mr. Scott. What services does GEO provide
11 to ICE?

12 A GEO provides services for the safe and secure detention of
13 detainees as they work through their immigration cases, and
14 those services that allow them to work through their
15 immigration cases until the courts ultimately decide their
16 outcome.

17 Q Who decides who is detained at the facility?

18 A ICE.

19 Q How do you know who ICE is sending to your facility?

20 A There is a number of ICE forms that we get. Most
21 importantly, the one ICE form particularly, the I-203, which
22 is the order to detain or release an individual that has to
23 be filled out by ICE as a law enforcement entity.

24 Q Do you have the ability to fill out an I-203 detainee
25 form?

1 A I do not.

2 Q Does anyone at GEO have that authority?

3 A No one at GEO has that authority.

4 Q Do you need detainees in the voluntary work program to
5 keep the facility safe and secure?

6 A We don't need detainees, no, to keep the facility safe and
7 secure. That is strictly the job of officers, and detainees
8 don't need to do that.

9 Q Does having detainees in the voluntary work program make
10 it easier to keep the facility safe and secure?

11 A I would say no. The best way to have any -- if you look
12 at the maximum security prison -- safe and secure, nobody
13 leaves their cell. We don't do that, but it does add a level
14 of oversight that we have to watch detainees with tools and
15 equipment. It adds a level of safety and security that we
16 have to look at.

17 Q If your officers didn't have to watch VWP participants
18 with tools, would that free up time for them to do other
19 tasks?

20 MR. WHITEHEAD: Objection, Your Honor, leading.

21 THE COURT: I think it is a self-answering question,
22 Ms. Scheffey. Ask another question.

23 BY MS. SCHEFFEY:

24 Q In your experience, do the detainees at the facility clean
25 up after themselves?

1 A Yes.

2 Q Other than detainee volunteers, who cleans the facility?

3 A Everyone that cares about the facility and the sanitation,
4 myself, my staff, detainees that have the responsibility
5 themselves to take care of their areas, clean up the
6 facility.

7 Q Where do the janitors come in?

8 A The janitors are there primarily for the areas that
9 detainees are not allowed to go to in accordance with the ICE
10 standards.

11 Q When you talk about the areas detainees aren't allowed to
12 go to, does that include the ICE areas?

13 A Includes the ICE offices, GEO administrative offices which
14 are outside the secure area, the court areas, EOIR, executive
15 office of immigration review, all the other government
16 agencies that provide services at the center, detainees are
17 not allowed in those areas.

18 Q Why have you never paid minimum wages to detainees?

19 A It has never come up before, prior to this lawsuit. We
20 have never heard of or been inspected or issued any type of
21 direction to pay minimum wage.

22 Q Other than the type of detainees your facility holds, is
23 it any different than other confinement facilities around the
24 state?

25 MR. WHITEHEAD: Objection, foundation.

1 THE COURT: Sustained.

2 BY MS. SCHEFFEY:

3 Q Have you been to other jails, prisons, other facilities
4 across the state?

5 A I did visit Monroe.

6 Q And what is Monroe?

7 A Monroe is a state correctional facility.

8 Q How is -- is your facility the same or different than
9 Monroe?

10 MR. WHITEHEAD: Objection, foundation. I think it is
11 also vague.

12 THE COURT: That is a very broad question,
13 Ms. Scheffey. I don't know exactly what you are driving at.
14 The objection is sustained.

15 BY MS. SCHEFFEY:

16 Q Is your facility layout similar to the facility layout at
17 Monroe?

18 A Our facility layout is very inclusive of any secure type
19 setting -- confinement setting with detention centers and
20 correctional facilities throughout the state.

21 Q Are detainee workers integral to your operations at the
22 facility?

23 A I say they are not integral. They are very important. We
24 care about giving detainees opportunities to perform
25 activities that decreases their idleness. GEO -- we can do

1 all the essential functions of the job.

2 Q Would it change your operations if voluntary work program
3 detainees became employees?

4 A It would change a lot logistically. I really don't know
5 how that would work. We would have to keep different
6 classification of detainees separate. They can't move at the
7 same time. They can't go to the same phones at the same
8 time. Some of them can't leave their housing unit to go to
9 other housing units. I really don't know how that would
10 work. It would drastically change the way the program was
11 intended to be laid out.

12 Q Would those changes make your facility easier to operate
13 or more difficult to operate?

14 A I think it would be extremely more difficult to operate.
15 If we had to pay minimum wages to some detainees, it would --
16 and not everybody got minimum wage, you would start getting
17 gangs that wanted to control where the money was coming from.
18 You would get more fights. You would get more facility
19 violence. That's exactly why corrections and confinement
20 centers don't run programs and work programs and pay minimum
21 wage.

22 Q As it stands today, do you hold detainee volunteers to the
23 same standards as your employees?

24 A No, I do not.

25 Q Do you have the same type of control over detainee

1 volunteers as your employees?

2 A I don't. Detainees have a number of services they need to
3 attend to. Courts. I don't know when they are going to go
4 to court necessarily or have a doctor's appointment or want
5 to go to outdoor rec or want to stay in the unit and play
6 video games. I have no control over those types of functions
7 with detainees.

8 Q If one of your officers would want to play video games one
9 day and not come to work, how is it any different?

10 A We have a leave program, progressive discipline program
11 for officers. If he wanted to take vacation that day and he
12 has vacation allowable and we would permit that, he could
13 take the day off and play video games if he wanted to.

14 Q Are you saying it is no different for detainees than
15 employees that want to take the day off?

16 A There is a limit to how many times an employee can take a
17 day off. If he was in a tournament and ran out of vacation
18 time and decided not to show up to work, we would start
19 looking at progressive discipline and potentially termination
20 of that employee for not showing up to work. Detainees, they
21 don't have to participate in the voluntary work program.
22 They could say, "I don't want to do it today," and a week
23 later come back and say, "You know what, I want to volunteer
24 again." They are allowed to do that.

25 Q Are detainees subject to that progressive discipline you

1 just described?

2 A No, that is strictly in the GEO policy for staff.
3 Detainees have a separate, in accordance with the ICE
4 standard, disciplinary procedure that is very formal.

5 Q Is there a limit to the number of days a detainee can take
6 off from the voluntary work program?

7 A No.

8 Q Any restriction on how many times a detainee can leave the
9 program and ask to come back?

10 A No.

11 MS. SCHEFFEY: I have no further questions.

12 CROSS-EXAMINATION

13 BY MR. WHITEHEAD:

14 Q Good morning, Mr. Scott.

15 A Good morning, Mr. Whitehead.

16 Q You have already testified at trial, correct?

17 A Yes.

18 Q In fact, your testimony straddled two days. Do I have
19 that right?

20 A Yes.

21 Q I questioned you, what, last Monday? Do I have that
22 right?

23 A It has been a crazy week. I believe it was Monday.

24 Q You had a chance to think about your testimony overnight,
25 correct?

1 A Yes.

2 Q And you came back the following morning, and I think you
3 answered Ms. Scheffey's questions. Do I have that right?

4 A To the best of my recollection.

5 Q I asked you some follow-up questions, I think, as well.
6 Do you remember that?

7 A Yes.

8 Q You already had a chance to say your piece at this trial,
9 correct?

10 MS. SCHEFFEY: Objection, argumentative.

11 THE COURT: Sustained.

12 BY MR. WHITEHEAD:

13 Q Well, nothing has changed since the last time we spoke.
14 For example, you are still the facility administrator at the
15 Northwest Detention Center, correct?

16 A Yes.

17 Q It is still your job to protect GEO's interest at the
18 Northwest Detention Center, right?

19 A It is my job to follow the contract and do the services
20 required by the federal government.

21 Q You offered new testimony this morning about your belief
22 that there would be an uptick in gang violence if detainee
23 workers were paid more money. Do I have that right?

24 A I don't think I said gang violence. I think I said gangs
25 would likely want to control who got the money.

1 Q You are aware that at the Northwest Detention Center, GEO
2 has, on occasion, paid more than a dollar a day for detainee
3 work. Do I have that right?

4 A Yes.

5 Q On those occasions, there was no uptick in gang violence
6 experienced at the Northwest Detention Center. Do I have
7 that right?

8 A It is because the program was run in accordance with the
9 standard and voluntary, using a waiting list, and everybody
10 had the same opportunity.

11 MR. WHITEHEAD: I don't think I have any further
12 questions. Thank you, sir.

13 THE COURT: Anything further for Mr. Scott?

14 Thank you, Mr. Scott. You may be excused.

15 THE WITNESS: Thank you, Your Honor. Have a good
16 day, sir.

17 MS. MELL: I just need a moment to confer with
18 counsel. One quick moment.

19 GEO rests, Your Honor.

20 MR. WHITEHEAD: Your Honor, we do have a motion that
21 should probably be discussed outside the presence of the
22 jury.

23 THE COURT: Does either plaintiff have rebuttal
24 testimony to offer?

25 MS. CHIEN: Not from the State.

1 MR. WHITEHEAD: No, Your Honor.

2 THE COURT: Do we need to hold the jury here for
3 whatever we have to do outside their presence?

4 MS. SCHEFFEY: No, Your Honor.

5 MR. WHITEHEAD: No, Your Honor.

6 THE COURT: Ladies and gentlemen, I did not
7 anticipate that the evidence would be over so quickly today.
8 There is lots yet to do. There are motions that the lawyers
9 will make and that I will have to rule on, and also there are
10 jury instructions to be prepared that are a little complex
11 and are going to take me some time and working with the
12 lawyers on jury instructions.

13 We are not going to have anything else for you until
14 tomorrow morning. Let me excuse you for the rest of the day.
15 You can take the day off and do whatever you want. I usually
16 tell jurors at this point that I won't report to your spouses
17 or employer that you got part of the day off. You can do
18 what you want.

19 It is important that you keep your mind open. You have
20 not heard everything yet. There may be more testimony. Even
21 though the parties have rested, sometimes there is a reason
22 to reopen. You haven't heard the instructions on the law,
23 nor the arguments of counsel. Of course, you have not
24 conferred with each other regarding deliberations and a
25 verdict.

1 The reason I recite those things is that it is important
2 for you to keep your minds open on all issues and not
3 conclude anything until you have heard everything.

4 Also, it is important that you don't discuss the case with
5 each other or anyone else. Don't let anyone talk to you
6 about it. Don't read, view or listen to any news accounts.
7 Don't do any independent research on any of the matters you
8 heard discussed in court. We will work as fast as we can and
9 hopefully we will be ready for you first thing tomorrow
10 morning.

11 I do have an 8:30 hearing tomorrow morning on another
12 matter, and I am hopeful that we will be ready otherwise
13 first thing in the morning. I will try not to make you wait.
14 It could be that we wouldn't start until some time after
15 9:00. We will try and be ready for you.

16 Okay. You all may be excused until 9:00 tomorrow morning.

17 Thank you.

18 (The following occurred outside the presence of the jury.)

19 THE COURT: Okay. Who is first?

20 MR. SILVERMAN: Judge, I presume each side has a Rule
21 50 motion. Why don't we start and say the first two
22 sentences so we preserve it, and we can talk about argument.

23 From the defendant, we renew their motion under Rule 50
24 for judgment as a matter of law.

25 MS. CHIEN: State of Washington would also move,

1 given the un rebutted facts and dismiss defense -- GEO's
2 assertion of the residential exemption, the government
3 facilities exemption, their assertion of intergovernmental
4 immunity, and would join private plaintiffs' motion regarding
5 the Minimum Wage Act on liability, and dismiss derivative
6 sovereign immunity.

7 MR. WHITEHEAD: That is correct. We anticipate
8 filing a motion here momentarily. We would move on the MWA
9 claim, as well as GEO's defenses regarding intergovernmental
10 immunity, derivative sovereign immunity, and the application
11 of the MWA exemptions that GEO has identified.

12 MR. SILVERMAN: Judge, on behalf of defendants, we
13 renew our motion, since we put on our defense case, we are
14 filing a short supplemental motion that deals with the
15 evidence presented on the intergovernmental immunity and
16 sovereign immunity issues. On that basis, we renew as to our
17 previous motion, as well as we believe we have established
18 our affirmative defenses on those two defenses as a matter of
19 law.

20 THE COURT: All right. I have three motions pending.
21 The question on the certification of -- or decertification of
22 the class. When is that going to be ripe?

23 MR. WHITEHEAD: We were going to file that motion on
24 Monday. We can file sooner if Your Honor would like us to.

25 THE COURT: I thought you all had agreed on resetting

1 that date from the 18th?

2 MS. SCHEFFEY: It is --

3 MR. WHITEHEAD: The motion is noted for next Friday,
4 June 25th, making our opposition due on Monday, June 21. As
5 I have stated, if Your Honor would prefer us to complete the
6 briefing schedule sooner, we can certainly make that happen.

7 MS. SCHEFFEY: GEO would work with private plaintiffs
8 on any schedule they propose for replies.

9 MR. WHITEHEAD: By sooner, Your Honor, I mean
10 tomorrow.

11 THE COURT: It appears to me that we don't have to
12 deal with that issue in this first phase of the case. How a
13 verdict applies to the class would be subject to revision
14 after the fact, perhaps. I don't think it has anything to do
15 at this point with this first phase. I am not inclined to
16 adjust your schedule.

17 Now, you all want to be heard, and it is -- some of what
18 you mentioned you wanted to talk about has to do with jury
19 instructions. I am willing to hear whatever you have to say
20 as long as it is entertaining argument. So who goes first?

21 MR. SILVERMAN: I will start for defendants. I
22 believe the objections to the jury instructions have been
23 fully briefed. Just working backwards from the tentative
24 instructions that the Court had prepared, I think we have --
25 we have set forth from the defendant's perspective our views

1 on which -- starting with the question of whether there is
2 employment -- employee/employer status under the MWA. You
3 have seen the briefing from defendants on the question of
4 which test applies. We fully briefed that. So from a --
5 from that perspective, we have put our objections to the
6 tentative until, again, they become the finals.

7 To the extent the Court then does issue jury instructions,
8 I presume both sides will then object to the ones that they
9 don't agree with to preserve that record. In terms of an
10 oral argument of what each side has already briefed in the
11 objections, I think we have done that.

12 Unless Your Honor wants to rehear some of those issues, I
13 just want to preserve our arguments, which is that we have
14 put in our objections to what we call the tentative
15 instructions. Once you issue them, we will renew them to
16 preserve them.

17 THE COURT: Okay.

18 MR. SILVERMAN: The only other issue I would raise is
19 there is one peculiar aspect from the defendant's perspective
20 on the jury instructions in which, on the intergovernmental
21 immunity instruction, the verdict form says, "unfair
22 discrimination." We just want to make sure, because the word
23 "unfair" is really a question under the jury instructions.
24 Either you find discrimination or you don't. I don't want
25 there -- I don't want there to be a situation where the jury

1 finds there is discrimination and then goes to the verdict
2 form and then has a separate question of whether they were
3 unfair. So I raise that on the verdict form.

4 I just want to make it abundantly clear we are not waiving
5 our objections. Once you issue what you believe to be the
6 jury instructions as opposed to the tentative which nobody
7 was supposed to rely on, we need our opportunity to preserve
8 our objections to those, to the ones we object to.

9 THE COURT: Yeah. We are a long way from final
10 instructions.

11 MR. SILVERMAN: If we can set some time so we can
12 argue about that when they come.

13 THE COURT: Who is next?

14 MR. BERGER: To the point of jury instructions,
15 although we did outline our primary concerns with the
16 discussion drafts in our submission, there are a few
17 additional items in the jury instructions that we would like
18 to be heard on both in terms of inclusion of some of the
19 proposed instructions, both agreed instructions and disputed
20 instructions that were not included in the discussion draft,
21 and that a couple of issues -- smaller issues with the
22 verbiage of some of the discussion drafts that we didn't
23 raise in the written responses, but, you know, have since
24 come to appreciate. We would just want an opportunity to be
25 heard on those as well rather than the assumption that

1 everything was covered in our written submission.

2 THE COURT: Okay. State?

3 MR. POLOZOLA: Yes, Your Honor. We also have four
4 additional instructions that we would proposed adding to the
5 discussion draft -- or three for the State.

6 The first would be the parties agreed Instruction No. 17
7 that was about stipulations of fact. We have since had
8 admitted into the record Exhibit 609 with the agreed facts.
9 We would request an instruction instructing the jury that
10 Exhibit 609 contains agreed facts that are to be deemed
11 proved in this case. Additionally --

12 THE COURT: Excuse me. That's your instruction
13 number what? 17?

14 MR. POLOZOLA: The parties agreed to Instruction
15 No. 17, but contained a placeholder for the actual agreed
16 facts. That is now Exhibit 609.

17 THE COURT: All right. All right.

18 MR. POLOZOLA: Additionally, we would request the
19 plaintiff's proposed Instruction No. 7, which set forth the
20 basic elements of a Minimum Wage Act claim. We think this is
21 particularly important to include, given the amount of
22 testimony and suggestions by GEO that the ICE-GEO contract
23 defined who could be an employee. It is Washington state law
24 that defines how "employee" is to be considered in this case.
25 We believe the proposed Instruction No. 7 clearly explains

1 that to the jury and would ask the Court to include that
2 instruction.

3 THE COURT: That's your requested No. 7?

4 MR. POLOZOLA: Yes, in the disputed instructions.

5 The third for the State, Your Honor, is the plaintiff's
6 proposed Instruction No. 10 that volunteers are not permitted
7 under state law for for-profit companies. We think this is
8 extremely important given the name of the voluntary work
9 program and the amount of emphasis that GEO has placed on the
10 workers as volunteers.

11 To avoid prejudice to the State, the jury should have a
12 clear understanding that under state law, volunteers are not
13 permitted for-profit companies, and we request an instruction
14 to that effect. That is our proposed Instruction No. 10,
15 Your Honor.

16 We have objections that have been lodged in writing to the
17 Court that was a joint submission with the private class. I
18 believe it was ECF 455 in the State's case.

19 THE COURT: I have that in front of me. I have not
20 analyzed all of that. I have it. I have read it once.

21 MR. POLOZOLA: I won't walk you through that in
22 detail. We do have objections that were contained in the
23 written submission as well as additional objections that we
24 would like to lodge for the record.

25 In particular, with the Court's proposed Instruction No. 4

1 on the burden of proof, we would lodge an objection to the
2 second sentence about intergovernmental immunity for the
3 reasons explained in our forthcoming JMOL motion. We don't
4 believe that issue should be put to the jury. It is a
5 question of law, and there hasn't been sufficient evidence
6 presented here to warrant putting it to the jury.

7 To the extent GEO continues to press and the Court allows
8 the jury to consider GEO's affirmative defenses on the
9 exemptions under the Minimum Wage Act, those exemptions are
10 issues on which GEO bears the burden because they are
11 affirmative defenses. The instruction on its -- it is page
12 four of the Court's discussion draft -- would need to clearly
13 delineate that GEO bears the burden on any such exemptions if
14 they are put to the jury.

15 Your Honor, we also, for the proposed Minimum Wage Act
16 definitions instruction that the Court included in its
17 discussion draft, that was on Page 15, we briefed some of
18 these objections. I do want to be clear that we object to
19 the exception -- or the definition of "employee" including
20 the exception for government facilities in the definition.
21 Part of that is for the reason I just explained, that it is
22 GEO's burden to prove entitlement to an exemption, and
23 putting them together muddles that for the jury.

24 Second, we don't believe GEO is entitled to assert that
25 exemption at all, so there is no need for it to be included

1 in the definition of "employee." Including one exemption
2 rather than all of the exemptions in the Minimum Wage Act
3 suggests there is undue import for that one. We don't
4 believe that is appropriate.

5 THE COURT: Under this draft, it was drafted in mind
6 with one immunity offense available based on that one
7 exemption. Where would the exemption go?

8 MR. POLOZOLA: Your Honor, I believe if the
9 intergovernmental immunity issue is going to be put to the
10 jury, that exception or exemption (k) should be with the
11 immunity instruction so as not to suggest it is at issue
12 under the Minimum Wage Act because it should not be. The
13 Court has already held repeatedly, and we are going to
14 explain this in our JMOL briefing in more detail, that GEO is
15 not entitled to exemption (k) because it is not a state,
16 local or municipal institution.

17 By including it in the definitions under the Minimum Wage
18 Act, it suggests to the jury that the Northwest Detention
19 Center might be. That would be contrary to the Court's prior
20 rulings.

21 We would suggest the plain language of that exemption, if
22 it is to be included, be included only in the immunity
23 discussion so as to clearly frame that issue for the jury.

24 Additionally, Your Honor, for the instruction on Page 17
25 of the discussion draft, these were the proposed factors for

1 the Minimum Wage Act. Again, we have briefed the issue that
2 we don't believe factors are necessary. We believe the
3 definitions under the Minimum Wage Act are clear and should
4 apply.

5 Insofar as the Court will instruct the jury on a
6 multifactor test, I would point out a few things here.
7 First, the language in the first sentence, Your Honor, that
8 refers to the detainees enrolled in the VWP, we believe
9 mischaracterizes the workers and the evidence in this case.
10 They don't enroll in the voluntary work program. They are
11 workers at the Northwest Detention Center. They should be
12 called detainee workers, in the State's view.

13 Additionally, on the first factor that the Court proposes
14 to use, the nature and degree of control of the detainees by
15 GEO, we believe the issue is not control of the detainees,
16 but of the detainees' work. By framing this first factor as
17 merely the degree of control, we believe that essentially
18 allows for a detention-specific Minimum Wage Act analysis
19 which the Court has held is not appropriate, and we believe
20 is not appropriate. We believe that factor would need to
21 focus on the nature and degree of control of the detainees'
22 work by GEO.

23 We have briefed in ECF 455 objections related to the
24 Factors No. 6 and 9. I will rest on those.

25 With respect to the intergovernmental immunity instruction

1 on Page 18, that will be subject to our JMOL motion, and we
2 don't believe it should be put to the jury, but insofar as it
3 is, we have proposed additional language in our filing at ECF
4 455 that we believe would be appropriate if the issue is
5 going to be submitted.

6 The only final thing is on the verdict form, I will note
7 for the record that was briefed at ECF 455. We have provided
8 additional proposed language consistent with those objections
9 in that filing as well.

10 Thank you, Your Honor. I appreciate you letting me get it
11 all out there.

12 MR. SILVERMAN: To put on the record, the defendants
13 object to the proposed instructions that counsel has just
14 made. Obviously, I believe that we need the opportunity to
15 respond once they put it in writing. I think the Court has
16 indicated you will provide us that opportunity.

17 MR. BERGER: Your Honor, I apologize for not being
18 clear about the substance of my additional requests and
19 objections earlier. I didn't know we were going to get into
20 the substance at this point.

21 In addition to what Mr. Polozola laid out, the only two
22 additional things I would note is we do have a concern or
23 objection to the discussion draft at Page 10 dealing with
24 corporations can only act through employees, agents or
25 officers. Our concern is with the inclusion of classes in

1 that instruction, because classes do not have employees,
2 agents or officers in the same way.

3 THE COURT: I am aware of that.

4 MR. BERGER: Instead, we would propose giving the
5 joint Instruction No. 1, which defines class actions.

6 THE COURT: Okay.

7 MR. BERGER: That's all I have to add. Thank you.

8 MR. SILVERMAN: Again, Your Honor, we are
9 anticipating that we are going to have a time to argue our
10 substantive objections once you come out with the proposed
11 instructions.

12 THE COURT: Absolutely. The problem is getting me
13 time to make the changes that are appropriate. I have these
14 motions in front of me. Any of you have anything else to say
15 on these, on the motions pending?

16 MR. SILVERMAN: Yes, Ms. Mell has one note on the
17 issue that came up this morning, the L&I administrative
18 policy.

19 MS. MELL: Your Honor, getting an instruction that
20 contains the ESA1 descriptor for sub (k) would be important,
21 particularly if the request or the Court is moved to put in a
22 provision or instruction that says "private corporations
23 can't have volunteers." Private corporations can have
24 volunteers if they are operating and functioning within the
25 confines of state law mirrored to federal law where the

1 detention is exempt from the Minimum Wage Act.

2 It would be very prejudicial to GEO to have an instruction
3 saying private corporations can't have volunteers when they
4 are mandated to have volunteers by federal law, and under
5 state law any private contractor operating at the direction
6 of the state with regard to residents, inmates or patients of
7 state, county or municipal correctional, detention, treatment
8 or rehabilitative institutions can use volunteers. The
9 testimony was clear that CI, Correctional Industries, is an
10 entirely volunteer program.

11 MS. CHIEN: We object to any instruction as to ESA1.
12 As Mr. Grice testified, that's not the law.

13 MS. MELL: It is the standard and guidelines given to
14 employers like GEO.

15 THE COURT: Wait a minute. Which of you speaks for
16 GEO on jury instructions?

17 MR. SILVERMAN: I do.

18 THE COURT: Okay. I only want to hear from one
19 person on this subject from each party. That includes you
20 too, Ms. Chien. Mr. Polozola started this.

21 MS. CHIEN: Got it.

22 THE COURT: All right. Anything else now?

23 On these motions, I am satisfied, as I was at the
24 conclusion of the plaintiffs' case, that there are issues of
25 fact on the subject matter of this case that require that it

1 go to the jury. In regard to requests for judgment on
2 particular issues and defenses, those will be resolved in the
3 jury instruction process.

4 I am satisfied that the State's motion and the class's
5 motion for judgment -- that is for final judgment -- should
6 not be granted because there are issues of fact that remain
7 for the jury.

8 Now, is there anything else you want to talk to me about
9 before I get to do my work? I have a heavy remaining day to
10 get these instructions in shape. I need you to stand by to
11 come back to Court when I need you. It will be afternoon.
12 Anything else now?

13 MR. SILVERMAN: Nothing else from the defendant.

14 THE COURT: You all go get your final arguments
15 ready. You've got time to prepare now. That should make
16 them short.

17 Okay. I will work as fast as I can to try and get these
18 prepared and that conform to the law and the evidence.

19 MS. MELL: Thank you, Your Honor.

20 (Recessed.)
21
22
23
24
25

AFTERNOON SESSION

JUNE 14, 2021

(The following occurred outside the presence of the jury.)

THE COURT: This is an additional instruction conference basically. I have provided a draft set of instructions. I have not numbered them because there may be more changes. If you refer to them, you have to give us time to catch up to the instruction you are talking about.

I read your submissions and made a lot of changes in what I submitted before.

It is clear from the evidence, in my judgment, that the defendant is not entitled to instructions on derivative sovereign immunity or direct regulation intergovernmental immunity or the resident exception to the Minimum Wage Act because in the last matter, the duties do not require that the detainees live at the detention center. That's substantially proven by all the evidence we have had that those jobs, those duties, could be conducted by GEO staff. I don't think the evidence supports an instruction on that defense.

I do think, as is reflected in the instructions, that the defendants have made out a case for immunity based on discrimination. That is the basis for these instructions.

Now, this is not the time for formal exceptions. That will come later. I want to know what is left out and that

1 you think is necessary and any objections you have to these
2 instructions. In other words, I am interested in correcting
3 what we have here at this point.

4 Who goes for the State? Mr. Polozola?

5 MR. POLOZOLA: Yes. Thank you, Your Honor. Our
6 primary point of discussion would be the intergovernmental
7 immunity instruction, which perhaps is no surprise. We have
8 a number of issues that we would like to point out and
9 address with the Court.

10 I will let you catch up, per your request. Are you there?

11 THE COURT: I am caught up.

12 MR. POLOZOLA: Starting with paragraph 1, Your Honor,
13 we believe that --

14 THE COURT: Just a minute. You are talking about the
15 affirmative defense instruction?

16 MR. POLOZOLA: The intergovernmental immunity
17 instruction, Your Honor. Yes, in the first paragraph, it
18 starts with, "It is an affirmative defense to plaintiffs'
19 claims."

20 We believe the second sentence is somewhat unclear and
21 could be revised to more accurately state the law which would
22 be, "Discrimination here means to treat GEO less favorably
23 than similarly situated state facilities."

24 Then from there, Your Honor, we believe the second
25 paragraph that begins with "as applied" here --

1 THE COURT: Just a minute. Give me the language you
2 propose again.

3 MR. POLOZOLA: For the second sentence we would
4 propose, "Discrimination here means to treat GEO less
5 favorably than similarly situated state facilities."

6 THE COURT: Change to "treat GEO less"?

7 MR. POLOZOLA: "Less favorably than similarly
8 situated state facilities."

9 THE COURT: Okay. Go ahead.

10 MR. POLOZOLA: Thank you, Your Honor. The reason for
11 that is GEO is the defendant asserting the defense and
12 asserting that it is the entity that is being discriminated
13 against. So the question must necessarily be framed as
14 whether GEO is being treated differently from similarly
15 situated entities, in our view.

16 Going on to the second paragraph, Your Honor. We would
17 propose striking that paragraph because it is unnecessary and
18 it assumes what is essentially the key issue about whether
19 the State and GEO are, in fact, similarly situated and
20 therefore proper comparators.

21 We believe the instruction would be clearer, more
22 accurate, and make more sense to the jury if it simply
23 proceeded to the third paragraph that defines how the jury
24 should determine similarity. We do have some proposed
25 changes to that paragraph as well.

1 THE COURT: What are those?

2 MR. POLOZOLA: Those are similar to what we had
3 identified before, Your Honor. In short, that the State has
4 no, quote, "voluntary work program," in all caps, the way
5 that GEO does. So by drafting the instruction this way, it
6 suggests an equivalence that is not supported in the
7 evidence.

8 What I would propose on the third paragraph would be to
9 state that, "In determining similarity, you may consider
10 whether there are any significant differences between GEO and
11 other state facilities and work programs operated by each and
12 between detainees of each that justify the differential
13 treatment." I'll repeat it for you.

14 THE COURT: Go ahead, repeat it.

15 MR. POLOZOLA: "In determining similarity, you may
16 consider whether there are any significant differences
17 between GEO and other state facilities, work programs
18 operated by each --

19 THE COURT: GEO and other -- between GEO and other
20 state facilities?

21 MR. POLOZOLA: "And state facilities," Your Honor.

22 THE COURT: All right.

23 MR. POLOZOLA: "Work programs operated by each and
24 between detainees of each that justify the differential
25 treatment of each."

1 THE COURT: "Work programs operated by each."

2 MR. POLOZOLA: "And between detainees of each."

3 THE COURT: Okay.

4 MR. POLOZOLA: "That justify the differential
5 treatment."

6 THE COURT: Okay. I got your suggestion.

7 MR. POLOZOLA: On the related point, if I may, I
8 would like to address the verdict form on this
9 intergovernmental immunity issue as well. In particular, to
10 really be clear on what the jury must determine here, the
11 question is whether there is unfair discrimination, not
12 merely whether GEO is treated differently from any other
13 entity.

14 We would propose a two-question verdict form on this issue
15 with the first being: "Do GEO and Washington operate
16 similarly-situated work programs?"

17 THE COURT: "Operate"?

18 MR. POLOZOLA: "Similarly-situated work programs."

19 THE COURT: Okay.

20 MR. POLOZOLA: The second question: "If so, does the
21 Minimum Wage Act discriminate against GEO because it is a
22 federal contractor?"

23 THE COURT: I got it.

24 MR. POLOZOLA: Thank you, Your Honor. We propose
25 that because it really is a two-part inquiry. There have to

1 be programs or facilities that are similarly-situated before
2 you can determine whether the differential treatment, if any,
3 is due to GEO's status as a federal contractor. We believe
4 that would appropriately get to the issue.

5 I will turn it over to class counsel, if they have
6 additional things to add, if I may.

7 THE COURT: You woke them up.

8 MR. BERGER: I am here. I am paying attention.

9 We would join the State's concerns and statements
10 regarding the intergovernmental immunity instruction and
11 question on the verdict form.

12 You know, in particular, the second paragraph of the
13 instruction drafted by the Court seems to be redundant of the
14 first and third paragraphs, and the reference to the
15 capitalized voluntary work program, you know, presupposes
16 facts, you know, that are not in evidence regarding the
17 different state programs. Not all the state programs that
18 were discussed were voluntary. For example, the Class III
19 programs in the correctional facilities and use of that
20 phrase, which is specific to the GEO program, suggests a
21 congruity that is not necessarily borne out by the evidence,
22 and therefore shouldn't be included in the jury instruction.

23 Beyond that, we have a few comments on some of the other
24 instructions. The instruction providing a definition under
25 the Minimum Wage Act that begins, "the law of the State of

1 Washington in the Minimum Wage Act."

2 THE COURT: Just a minute. Yes.

3 MR. BERGER: We note the last sentence of that
4 instruction, "Any agreement between such employee and the
5 employer to work for less than such wage rate is no defense
6 to such action." It is an accurate statement of the law, but
7 it is redundant of the instruction -- two instructions later
8 that deal with agreements and volunteers.

9 To avoid that redundancy, it might be easiest just to
10 strike that sentence from the last -- that last sentence in
11 the definitional instruction. We just wanted to note that
12 redundancy.

13 THE COURT: Right.

14 MR. BERGER: Then turning to the instruction setting
15 forth the elements of the Minimum Wage Act claim. So the
16 first parenthetical or the first element, I would just note
17 it seems that we should be talking -- even though the parties
18 are using Northwest Detention Center and Northwest ICE
19 Processing Center interchangeably throughout the case, I
20 believe at this point Northwest ICE Processing Center is the
21 proper --

22 THE COURT: Wait a minute. You are talking about
23 line 8 where I said "Northwest Detention Center"?

24 MR. BERGER: Yes.

25 THE COURT: And it is the Northwest?

1 MR. BERGER: ICE Processing Center.

2 THE COURT: Okay.

3 MR. BERGER: Our bigger concern here, though, is that
4 we believe the verdict form should parallel the issues stated
5 in the instruction. The first question on the verdict
6 form --

7 THE COURT: Yes.

8 MR. BERGER: First question on the verdict form, we
9 believe should parallel the first elements on the instruction
10 and read, "Under the Washington State Minimum Wage Act, did
11 GEO employ detainee workers in the voluntary work program at
12 the Northwest ICE Processing Center?"

13 THE COURT: All right. I see that. I have it down.
14 I don't know if Mr. Polozola was through.

15 MR. POLOZOLA: I am, Your Honor. We join
16 Mr. Berger's request and explanation. We are done. Thank
17 you.

18 MS. SCHEFFEY: Your Honor, I would begin by stating
19 that GEO objects to the changes that the State and class
20 plaintiffs have just requested, as well as renewing our
21 objections in ECF 378-1 and ECF 349.

22 I wanted to discuss objections to this current draft. I
23 want to start with the instruction that defines "employ,
24 employee and employer." Says, "The law of the State of
25 Washington and the Minimum Wage Act provides."

1 THE COURT: What is wrong with that?

2 MS. SCHEFFEY: First, we would object to the fact
3 this does not include the exception to the Minimum Wage Act,
4 exception (k) we believe it is unnecessarily confusing to
5 the jury to not explain to them there are exceptions to the
6 phrase "employee," including for the State residents, inmates
7 of a correctional facility, detention center, and suddenly
8 spring it on them in the discrimination instruction. Doesn't
9 make clear how the law works, and I don't think they will be
10 able to see how different exceptions play out.

11 We also object to the extent the only definition given to
12 the jury to consider about what an employee is, is just any
13 individual employed by an employer. This instruction is
14 directly contrary to the controlling law in the State of
15 Washington and *Anfinson vs FedEx*, which has unambiguously
16 found that the statutory definition of employee is ambiguous
17 and it incorporates the economic dependence test evolved by
18 the federal courts. The citation for that is *Anfison vs*
19 *FedEx*, 174 Wn.2d 851. The pincite is Page 868.

20 THE COURT: Now, just let me ask you about that. Are
21 there any cases that have defined employ and employer and
22 employee differently than they are defined in the statute?

23 MS. SCHEFFEY: Yes. I would state that *Anfison* and
24 also the other federal case law states that you look to the
25 multipart test, the economic dependence test which defines

1 what an employee is. Especially in this case and --

2 THE COURT: Does the -- are there any cases that
3 are -- other than differentiating between independent
4 contractors and employees in the State of Washington that
5 require just a simple definition of or just require these
6 considerations in a straight question of whether one is
7 employed? I am not sure I am putting that very well.

8 MS. SCHEFFEY: Your Honor, I think you are right, the
9 case law is not perfectly clear, that's what you are alluding
10 to. We point to *Calhoun vs State*, 146 Wn.App. 877 where the
11 court talked about the fundamental purpose and looked at an
12 individual who was participating in the SCC's program and
13 just said this doesn't align with the definition of
14 employment, but they did it as a matter of law.

15 I understand it is more complicated here where Your Honor
16 has decided there are fact issues. I think those fact issues
17 related to each of the factors in the economic dependence
18 test.

19 THE COURT: Wait a minute. You are talking too fast.
20 Give me the citation to your case again.

21 MS. SCHEFFEY: *Calhoun vs State*, 146 Wn.App. 877.

22 THE COURT: 146?

23 MS. SCHEFFEY: 146, yes, Wn.App. 877.

24 THE COURT: What does it say? Defines employment
25 relationship?

1 MS. SCHEFFEY: It both applies the exception (k), but
2 also states further when looking at detained individuals in
3 other non-traditional employment situations you have to look
4 at the fundamental nature of the relationship as a whole, see
5 if it fits within the definition of employment context.

6 That is the first objection. I know this isn't the place
7 for formal exceptions, so I will keep moving on the current
8 draft.

9 We would renew our objection to the citizenship
10 instruction as we last briefed in ECF 349.

11 THE COURT: Wait a minute. Wait a minute. I don't
12 know which instruction you are talking about. Tell me
13 what --

14 MS. SCHEFFEY: The page right after the definition,
15 if that helps, starts, "The Minimum Wage Act requires
16 employers to pay employees the minimum wage."

17 THE COURT: Okay. What is wrong with that?

18 MS. SCHEFFEY: We object to this as not relevant to
19 this phase of trial because it is applicable only to the
20 payment of back wages and has nothing to do with whether
21 detainees should be employees or classified as employees
22 going forward. The State's claim is purely forward-looking.

23 This implies and will confuse the jury that if they find
24 they are employees, that somehow they could supersede federal
25 law and entitle the individuals to minimum wage on a

1 forward-looking basis.

2 THE COURT: Okay. What else?

3 MS. SCHEFFEY: Next one we would go to is the
4 following instruction, which I will call the volunteer
5 instruction which starts with, "An agreement between employee
6 and employer." Mr. Berger already noted our first objection,
7 which is that the first sentence is in here twice, both in
8 the definition section and in this separate instruction. We
9 think that redundancy is prejudicial --

10 THE COURT: Wait a minute. I don't know what you are
11 talking about. Where is it a duplication?

12 MS. SCHEFFEY: The sentence that starts with, "An
13 agreement between an employee and employer". You see that?
14 That also is on -- if you go two pages back to the definition
15 instruction, the very last paragraph says, "An employer who
16 pays an employee less than minimum wages," the second
17 sentence in that paragraph, "Any agreement between such
18 employee and employer to work for less than such wage is no
19 defense to such an action."

20 THE COURT: Okay. I see what you mean.

21 MS. SCHEFFEY: Just twice says "an agreement is no
22 defense."

23 THE COURT: Yep. What next?

24 MS. SCHEFFEY: We argue there is no basis in law for
25 this volunteer instruction. The Minimum Wage Act explicitly

1 includes a volunteer exemption in its definition. The
2 definition sections proposed do not indicate they are going
3 to include any of those exemptions. To the extent we are not
4 explaining exemption, there is no legal support for giving a
5 counter exemption essentially saying the opposite applies.

6 As we would state again under the economic realities test,
7 volunteering is relevant and has been relevant up to this
8 point in all of our briefing as a defense to the Minimum Wage
9 Act because it goes directly to the issue about an employer's
10 control over the individual, because all of the former
11 detainees testified about their understanding of the program
12 being voluntary. That goes to whether they could have a set
13 schedule, whether they were supposed to show up every time,
14 if GEO could tell them which position to perform. All of
15 that is relevant to the employment relationship and how we
16 would typically assess whether someone is an employee.

17 Without that, essentially, there is no distinction, and we
18 also think this essentially just instructs the jury what to
19 find, which is that it is a voluntary work program, means it
20 is employment.

21 So we would argue that if this instruction is to be given,
22 it must be made clear to the jury that it is a question of
23 fact for them to determine whether the voluntary work program
24 is employment or whether the detainees are employees of GEO,
25 and that they may consider the voluntary nature of the

1 program in reaching that conclusion because that is a fact
2 issue, Your Honor.

3 THE COURT: Just a minute. Let me think about that.
4 I want to hear from plaintiffs on that.

5 MS. SCHEFFEY: I further state that the statement,
6 "Volunteering is not a defense to the Minimum Wage Act claim"
7 is legally inaccurate because in some circumstances it is.

8 The next one we would --

9 THE COURT: Under what circumstances here is it?

10 MS. SCHEFFEY: Exemption (d), any individual who
11 volunteers for a governmental body or agency for a nominal
12 stipend is not an employee under the Minimum Wage Act. If
13 someone volunteers for ICE -- that's exemption (d) to RCW
14 49.46.010. That's why we -- and we briefed this in ECF 349.
15 We believe this instruction is not appropriate because there
16 is an explicit exemption.

17 THE COURT: Just a minute. Let me get the statute.

18 MS. SCHEFFEY: Go to RCW 49.46.010, which is the
19 definition section of the Minimum Wage Act, under Section
20 (3)(d), which states the exceptions to the definition of
21 "employee" under the Act. It explains --

22 THE COURT: Wait a minute. Subsection what?

23 MS. SCHEFFEY: (3)(d), as in dog.

24 THE COURT: There is no (3)(d). (5)(d).

25 MS. SCHEFFEY: Someone printed this for me. It

1 starts with, "Any individual engaged in the activities of
2 educational, charitable" --

3 THE COURT: That's (5)(d).

4 MS. SCHEFFEY: Okay.

5 THE COURT: Unless -- you are right. It is (3)(d) in
6 the pocket part. What is your point with that now?

7 MS. SCHEFFEY: We think this instruction goes too far
8 because it is one thing for this Court to determine that the
9 exception doesn't apply and therefore not instruct the jury
10 on it. It is an entirely different thing to give them a
11 further instruction that the Court has found this doesn't
12 apply and volunteering has no weight.

13 We believe the appropriate way to deal with the
14 volunteering not applying is how you are dealing with every
15 other exception, which is you don't include it in the
16 definition. We think all exceptions should be treated the
17 same.

18 THE COURT: Ms. Scheffey, you talk very fast and in a
19 monotone. It is very hard to follow you. Slow it down and
20 take one thing at a time, and I will want to hear from the
21 defense on that issue. What is next?

22 MS. SCHEFFEY: The next thing would be the
23 instruction that begins, "Plaintiffs allege that GEO's
24 practice of paying detainee workers one dollar per day for
25 work."

1 GEO objects to this instruction, again, as contrary to the
2 controlling law in *Anfison* as we just discussed. There is no
3 definition of "employee" which the jurors are permitted to
4 apply as a matter of fact. Gives them no instructions about
5 the facts.

6 THE COURT: I will look at your case.

7 MS. SCHEFFEY: We would further object that this
8 doesn't explain to the jury that they need to find whether
9 detainees are employees, which is what is in the verdict
10 form. It should instruct them that that is their duty.
11 Their duty is not to find whether they -- what the amount is
12 that they should be paid or that they were employed. They
13 have to find that detainees fall within the definition of
14 "employee," and that GEO falls within the definition of their
15 employer.

16 Again, we would ask for some sort of instruction that that
17 is a question of fact for the jury to determine, because
18 right now the phrasing already talks about paying detainee
19 workers one dollar per day for work performed, which tracks
20 the definition and does not seem to give the jury any
21 discretion and presupposes that there was work performed.
22 And "employ" is to permit to work.

23 THE COURT: Go ahead.

24 MS. SCHEFFEY: I think, Mr. Berger, we would join his
25 request that the "Northwest Detention Center" be changed to

1 the "Northwest ICE Processing Center" for consistency.

2 THE COURT: Yes. I got that.

3 MS. SCHEFFEY: Then the last one is that we would
4 object to the defenses not given. GEO believes it has proven
5 through the evidence -- or presented evidence which a
6 reasonable jury could find it is entitled to derivative
7 sovereign immunity. There has been extensive testimony that
8 each of the things it did with respect to the voluntary work
9 program was directed by ICE coming from job descriptions to
10 placement and where they place people in the program, amount
11 of pay. Every element that we have gone through GEO has
12 presented some evidence that ICE directed it to do so.

13 We believe that remains a fact issue, and we do not
14 believe the facts are decidably on one side or the other.

15 The last would be we maintain that the jury should be
16 instructed as to the resident exception to the Minimum Wage
17 Act because it has presented evidence that one of the key
18 duties of the voluntary work program detainees was to be
19 available and detained at the facility when the task arose,
20 so they had to reside or sleep there.

21 THE COURT: Okay. All right. Thank you.

22 Let me go back to plaintiffs regarding the definition of
23 "employment" and that case, if you have it. I am going to
24 ask Rachel to bring it for me, 146 Wn.App. Okay. Who wants
25 to respond regarding the definition of "employment" and the

1 volunteer instruction?

2 MR. BERGER: Your Honor --

3 THE COURT: Nobody.

4 MR. BERGER: To start, with respect to *Anfison*, that
5 was a test that was specifically developed first by the
6 federal courts and then adopted by the Washington courts to
7 distinguish between independent contractors and employees.
8 It simply does not apply here where there is no -- there is
9 no question of independent contractor status. Instead, the
10 definition in the RCW applies, and I think we have covered
11 that in our prior briefing.

12 With respect to -- there is no cases applying that test
13 outside of the independent contractor classification issue.

14 *Calhoun* is not even a Minimum Wage Act case. It was a
15 case brought under the Washington Law Against Discrimination
16 and, in fact, the court states in that case -- specifically
17 states, "The state responds that neither the FLSA nor the MWA
18 applies to the present case. We agree."

19 So that court -- that case doesn't tell us anything about
20 the test for employee status under the Minimum Wage Act. The
21 court does go on to note the Section (k) exemption, but the
22 basic holding is that the MWA doesn't even apply in that
23 situation because it was not a Minimum Wage Act case.

24 MS. SCHEFFEY: If I may point you to the paragraph I
25 was referring to. Paragraph 16 of that case, where the court

1 says, "The record provides insufficient indicia of employment
2 in this case." It goes on to state that, "Calhoun's
3 employment is optional, paid and supervised, however, does
4 not necessarily demonstrate that he is an employee for
5 purposes of this statute. Rather, he is a pretrial detainee
6 attempting to adapt to life at the SCC. It is healthy for
7 SCC residents to remain active and feel productive on a daily
8 basis. For many of these residents, contributing to the
9 community in which they live undoubtedly facilitates the
10 treatment process. The SCC, which recognizes this, has
11 developed a treatment program into which these principles are
12 integrated. Earning a living is the goal of most workers,
13 but the primary goal of work at SCC is to maintain a healthy
14 life-style and promote good habits for residents. We are not
15 persuaded that Calhoun is an employee for purposes of Chapter
16 49.60 RCW." That is not applying the exemption (k); it is a
17 separate analysis. We believe that tracks *Ndambi* and the
18 other cases we have looked at, that at least consider the
19 alternate purposes of a program when individuals are confined
20 that may countervail the indicia of employment.

21 MR. BERGER: Again, Your Honor, I think the critical
22 sentence there is, "We are not persuaded that Calhoun is an
23 employee for purposes of Chapter 49.60 RCW." That's the
24 Washington Law Against Discrimination. The Minimum Wage Act
25 is RCW 49.46. The case is simply inapposite to the question

1 presented here.

2 MS. SCHEFFEY: We would state the definition of
3 "employee" would be the same for either. There is no
4 distinction between employees who can be discriminated
5 against and employees who can get the minimum wage. People
6 who are employees both are entitled to minimum wage and to
7 not be discriminated against by their employer. It is not a
8 dichotomy.

9 MR. BERGER: The case law recognizes that the
10 definition of "employee" can vary from statute to statute
11 which is precisely why two paragraphs earlier the court says
12 neither the FLSA nor the Minimum Wage Act applies to the
13 present case.

14 THE COURT: Thank you.

15 MR. BERGER: Turning to the other issue you asked
16 about, the instruction regarding volunteers. I think it is
17 precisely because there has been so much stress on
18 "volunteer" and "voluntary" by the defense in this case that
19 that is why this instruction is needed, because without this
20 instruction, the jury could easily misapprehend the law and
21 determine that individuals can volunteer for for-profit
22 corporations, and therefore be excluded or exempt from the
23 Minimum Wage Act when, in fact, the subsection (d) exemption
24 in the Minimum Wage Act is very clearly and expressly limited
25 to government agencies and non-profit entities.

1 So to avoid confusion, possible jury confusion or
2 misapprehension or misapplication of the law, that is why the
3 instruction is needed, and it is relevant. It is important
4 that it be given in this case.

5 MS. SCHEFFEY: Your Honor, we state it may be one
6 thing if you were giving the jury factors to consider, ways
7 they can weigh various elements that they have heard
8 throughout the trial. Here, in not giving them any elements,
9 any instruction of what they are considering, but then
10 telling them that volunteering is not a defense, you are
11 singling out a specific fact that we have presented evidence
12 of that we were not given notice of before trial, would not
13 be something we could indicate as part of control, and
14 excluding it from the jury's purview. We believe that would
15 be inaccurate as this is a voluntary program, and that is a
16 critical element of why it may or may not be employment.
17 Obviously, GEO says it is not employment because the
18 voluntary nature shows it doesn't have the traditional
19 indicia of employment, doesn't have the same control, which
20 is what every other court has considered.

21 MR. BERGER: Your Honor, all employment in the
22 United States is voluntary. Otherwise, we have a Thirteenth
23 Amendment problem. The point of calling it a voluntary work
24 program in the PBNDS is to distinguish it from compulsory
25 labor such as you might see in a prison setting like the

1 Class III, Category III work programs that were talked about
2 with Department of Corrections in this case where
3 incarcerated individuals can be required to work. That's the
4 issue with voluntary here, not whether somebody choosing to
5 work or not choosing to work affects the definitional
6 question under the Minimum Wage Act as to whether GEO or the
7 employer suffered or permitted them to work.

8 MS. SCHEFFEY: Your Honor, to the point that all
9 employment is voluntary in the United States, to the extent
10 that is true, then there is no need to instruct the jury.
11 They will be able to determine the voluntary nature and that
12 that is separate from employment. Here, the thing that
13 Mr. Berger is disregarding, and the jury is not being told it
14 can consider, is that in typical employment, you are working
15 as *Calhoun* said, to earn a living. That is the goal of why
16 you are working. It is different when you have all of your
17 needs met. We don't have any instructions about that,
18 despite our request. This just elevates plaintiffs' theory
19 of the case above all of the other exceptions, which are
20 simply being left out of the definition.

21 MR. BERGER: Nothing in the volunteer instruction
22 prevents GEO's counsel from talking about control, from
23 talking about the ability of detainees to choose not to work
24 in the program, from talking about their ability to change
25 their mind from day-to-day on whether they want to

1 participate.

2 What the problem here is, again, the possibility that the
3 jury will misapprehend the law to think that volunteers for
4 for-profit corporations can be exempt from the Minimum Wage
5 Act, and that clearly is not consonant with Washington law.

6 MS. SCHEFFEY: To the extent Washington law is any
7 individual employed by an employer, as we are instructing the
8 jury, that wouldn't be misapprehending it if they decided
9 that due to the voluntary nature, it is not like employment.
10 I would just end with, you know, this specifically says that
11 volunteering is not a defense to the Minimum Wage Act, and we
12 take issue with that because volunteering in terms of
13 control, which they are no longer being instructed on, is a
14 defense.

15 THE COURT: Okay. Let me point out to you that in
16 not listing considerations that the jury should consider in
17 determining whether this is an employment relationship, I
18 have left it open for you to argue all of those elements that
19 have been covered by the evidence in the case. This is not a
20 case where there is a decent definition of employment and
21 employer and employee. It is what we are stuck with in the
22 statute.

23 I think on balance, after looking at these cases and
24 everything, I think it would be a mistake for me to try to
25 list those things that the jury should consider, because they

1 can consider everything in the evidence. You can argue all
2 of those points that were in the original draft instruction
3 that I submitted. I have not removed anything. That
4 includes you can argue about the voluntary nature of this
5 relationship as indicating whether it was an employment
6 relationship or not. That alone and by itself is not a
7 defense to the Minimum Wage Act. I am satisfied with that
8 instruction as it stands.

9 Also, a quick look at this case tells me that it does not
10 establish a different -- that is the *Calhoun* case -- it does
11 not establish some different definition of "employment" and
12 "employee" that is directly definitive of those terms in this
13 setting. I don't think it adds much. It is not a Minimum
14 Wage Act case, in any event. I don't think it changes the
15 definition at all.

16 Now, you have got to give me time to prepare these the way
17 I think they should be, which we will do right now, and I
18 will consider your arguments and determine what, if anything,
19 should be changed. Give us at least a half an hour to do
20 that. I will ship the final proposed instructions and, after
21 that, we will hear exceptions so we can argue in the morning.
22 Thank you.

23 (Recessed.)

24 THE COURT: Counsel, we just sent a draft of the
25 instructions I propose to give. Let me know when you are

1 ready to take exceptions, through Tyler.

2 (Recessed.)

3 THE COURT: Okay. First, Ms. Scheffey suggested an
4 additional instruction that I have received and read. She
5 asks for an instruction that says, "It is a question of fact
6 for you, the jury, to determine if the ICE voluntary work
7 program is employment and if GEO is the employer, considering
8 all the evidence that has been presented."

9 I would decline to give that additional instruction,
10 Ms. Scheffey. I think, certainly hope, that the jury would
11 understand that they are to consider all the evidence in the
12 case and answer the question of fact that is set out perhaps
13 a little differently than you set it out there, but it says
14 basically the same thing. I don't think an additional
15 instruction is necessary.

16 I have provided to counsel proposed instructions numbering
17 1 through 20 and a proposed verdict form. Now is the time to
18 present exceptions to those instructions.

19 Mr. Polozola.

20 MR. POLOZOLA: Thank you, Your Honor. The State
21 takes exception to Instruction No. 17 with respect to
22 intergovernmental immunity. We don't believe it is an
23 accurate statement of the law, that it is unduly confusing to
24 the jury, and is unnecessary because the appropriate legal
25 test is whether the Minimum Wage Act discriminates against

1 the federal government, or with those with whom it deals.
2 And the relevant question is whether the law treats a
3 similarly-situated entity better than GEO because GEO is a
4 federal contractor.

5 The appropriate comparator in that analysis would be a
6 private contractor that owns and operates a detention
7 facility or another similarly-situated entity in the jury's
8 view.

9 We believe this instruction essentially makes that fact
10 determination for the jury by instructing them that the State
11 and GEO are to be compared directly against each other in
12 Paragraph 2 as we discussed earlier.

13 We also note that we don't believe there are facts in
14 evidence that warrant instructing the jury on
15 intergovernmental immunity with discrimination. We would
16 specifically point out that the Court has held previously
17 that the Minimum Wage Act treats private businesses like GEO
18 the same, whether or not they are doing business with the
19 federal government. That is ECF 162. We don't believe this
20 issue or this instruction, rather, is necessary.

21 Along the same lines, we, the State, would take exception
22 to the second question presented in the verdict form for the
23 reasons we discussed earlier. We don't believe that this
24 question presented to the jury on immunity accurately sets
25 forth the question that needs to be resolved in this case in

1 order to resolve the intergovernmental immunity defense.

2 THE COURT: Okay. Thank you.

3 Mr. Berger.

4 MR. BERGER: The private plaintiffs join the State's
5 exception to Instruction No. 17. In addition to the
6 considerations stated by Mr. Polozola, we believe the second
7 paragraph implies or states a finding of fact that the State
8 and its work programs are comparable to GEO, and therefore is
9 an improper instruction.

10 In that respect, we also join the exception to the second
11 question of the verdict form for the same reasons, that it
12 does not, we believe, accurately set forth the question that
13 the jury needs to consider under the intergovernmental
14 immunity defense, which is whether GEO is being treated -- is
15 being discriminated against based on its status as a federal
16 contractor.

17 THE COURT: Thank you. Defense, Ms. Scheffey.

18 MS. SCHEFFEY: Yes, as an initial matter, GEO takes
19 exception to the jury instructions that have been excluded
20 that were previously briefed at ECF 349 and 378-1. It is
21 GEO's position those instructions should have been included.

22 GEO takes exception to lack of a derivative sovereign
23 immunity and an instruction on the resident exception to the
24 Minimum Wage Act.

25 GEO takes further exception to Instruction No. 13, in that

1 it does not include a full description of the law. GEO
2 reiterates that the correct definition of employee must
3 follow some additional factors as set forth in *Anfison vs*
4 *FedEx*, which is binding case law. GEO states the best
5 guidance is *Ndambi*, disclosed in ECF 349, which is a case out
6 of the Fourth Circuit, pincite is 990 F.3d at 372.

7 GEO takes exception to 14 as inappropriate at this time.
8 Damages are not an issue.

9 GEO takes exception to Instruction 15, particularly in
10 that it calls out the volunteer exception and twists it on
11 its head without legal authority. There is no other
12 exception to the Minimum Wage Act that this Court has found
13 is inapplicable that it is getting its own exception to the
14 jury, instructing the jury specifically not to consider those
15 elements.

16 GEO takes exception to Instruction No. 16, specifically
17 when issued in connection with the instructions which state
18 that, "'Employ' includes to permit to work and 'employee' is
19 any individual employed by an employer." This instruction
20 presupposes the result, talking about paying workers for one
21 dollar per day for work performed, and asks if GEO employed
22 detainee workers without instructing them that they may
23 consider all evidence that has been presented or that this is
24 an issue of fact.

25 GEO further takes issue with Instruction 16 because it is

1 not an accurate statement of what the State must prove and
2 does not provide what the jury should consider, whether it be
3 all evidence that has been presented or a specific set of
4 factors.

5 Other than that, GEO still believes there should be
6 further instruction on what evidence the jury should consider
7 specifically with respect to its ability to consider the fact
8 that detainees volunteered because, as it stands, that has
9 been taken out of the consideration of the jury. GEO would
10 object that the law has changed after summary judgment and
11 after the evidence has been presented, and GEO believes that
12 raises a due process issue.

13 That is all, I believe, other than renewing ECF 349 and
14 378-1.

15 THE COURT: Thank you. Who is going to be arguing
16 for plaintiff?

17 MR. WHITEHEAD: I'll be arguing for private
18 plaintiffs.

19 MS. BRENNEKE: Andrea Brenneke for the State of
20 Washington.

21 THE COURT: For the defense. Ms. Mell? Okay. I
22 think I told the jury to come back at 9:00. I can't remember
23 that far back. Okay. Be here at 9:00 ready to go. I do
24 have a hearing at 8:30 or something. I will try and be
25 through with that so we can start promptly. We will hear

1 argument and see what the jury does.

2 I might tell you a couple of things. One is that, you
3 know, I come from a state court background, a long time ago
4 now. But in the state court, the judge can't comment on the
5 evidence. I have never felt that was a bad thing, and I have
6 always tried to avoid commenting on the evidence. The
7 instruction that was proposed that said you should consider
8 this, this, this, this and this in determining whether it was
9 an employment relationship, in my view is typical of the kind
10 of instructions that are simply comments on the evidence. I
11 don't think the Court needs to pick out special things for
12 the jury to consider under ordinary circumstances, and
13 counsel can certainly point out all those things in argument
14 that you think are important in regard to an employment
15 relationship, provided, of course, that your argument is
16 supported by testimony or evidence.

17 I also wanted to make this comment. We are faced here
18 with a bad state law that defines "employment." It is not a
19 complete definition in the statute, at least not as complete
20 as I would like, but it is what we have. The jury will get
21 the law the way it is, not in the way that it probably should
22 be. I think in the 18, nearly 18 years I was a state judge,
23 I was reversed 11 times, and one of those reversals was when
24 I instructed the jury on the -- and used the language of a
25 statute. The appellate court, in its wisdom, reversed me on

1 that and said the statute was not complete and it shouldn't
2 have been the subject of an instruction without some
3 embellishment. I never figured out what else I was supposed
4 to say because all I had was the law. I think it was
5 something as simple as the criminal definition of intent or
6 something like that that was very poorly drafted, in my view,
7 in the jury instruction. That was the only time I was
8 reversed on a jury instruction, I think, in the state court
9 in the years I served there.

10 That is not important to anybody. It is just a little bit
11 of history that is there in the back of my mind that is
12 somewhat relevant to this statute that we are dealing with
13 here.

14 Okay. I will see you in the morning. Get a good rest.
15 Don't eat too much. My dad always says a hungry dog hunts
16 best. Have a light breakfast. See you at 9:00.

17 (The proceedings adjourned.)
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

/s/ Angela Nicolavo

ANGELA NICOLAVO
COURT REPORTER